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No. 1124

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ROBERT H. FLEMING,

Appellant,

vs.

REUBEN B. DAIGLE,

Appellee.

TRANSCRIPT OF RECORD.

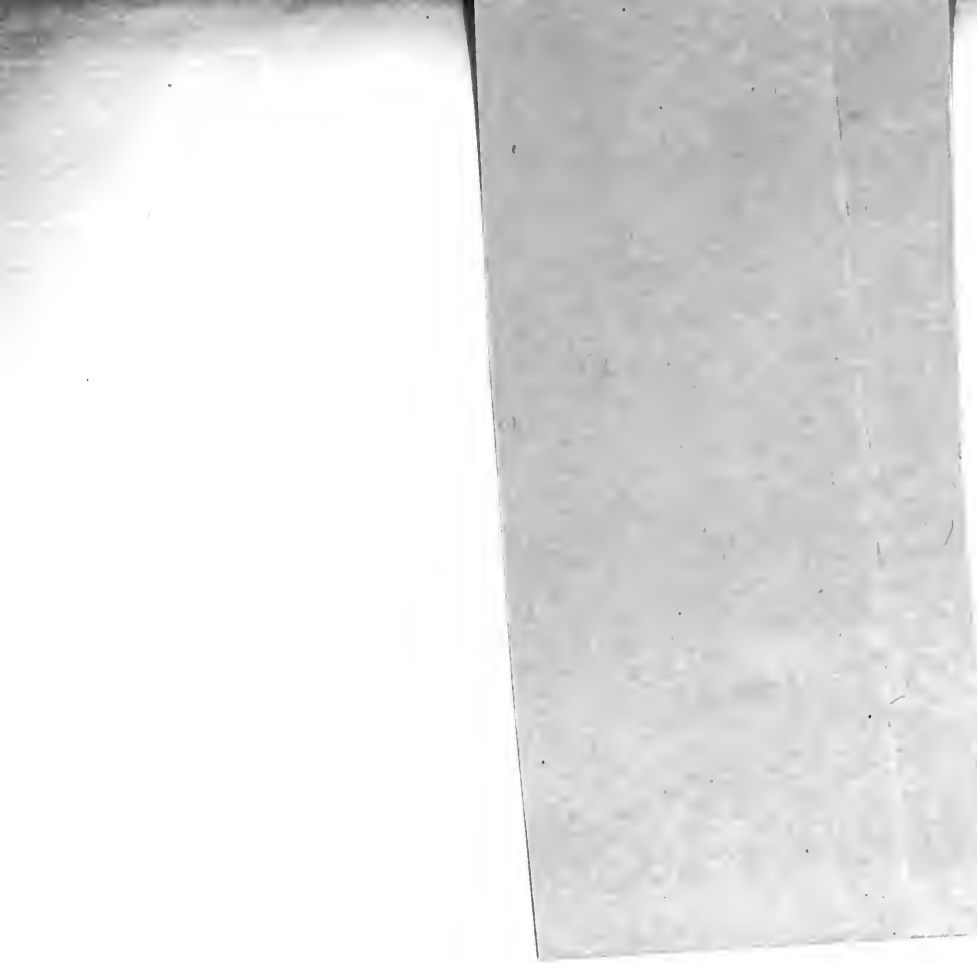
Upon Appeal from the United States District Court for the District of Alaska, Third Division.

FILMER BROS., PRINTERS, 424 SANSOME ST., S. F.

Records of Circuit Court

of Appeals

308



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United States Circuit Court of Appeals for the Ninth Circuit.

ROBERT H. FLEMING,

Appellant,

vs.

REUBEN B. DAIGLE,

Appellee.

Order Extending Return Day.

Now, on this 30th day of August, 1904, the above-entitled cause coming on to be heard before the Judge of the United States District Court in and for the District of Alaska, Third Division, at Fairbanks, Alaska, upon the petition of appellant, Robert H. Fleming, who appearing by his counsel, Messrs. Claypool, Stevens & Cowles, and the appellee having received notice of said motion, the said appellant requests an order extending the time within which to docket the said cause and to file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and shows that the same is necessary by reason of the great distance, slow and uncertain communication between said Fairbanks, Alaska, and the city of San Francisco, California; and the Court upon the hearing of said motion and being fully advised in the premises and considering that good cause has been shown for the granting of the same—

It is hereby ordered that the time within which the said appellant shall docket the said cause on appeal and the return day named in the citation issued by this Court be enlarged and extended to and including the 15th day of November, 1904.

JAMES WICKERSHAM,

Judge of the United States District Court in and for the District of Alaska, Third Division.

Due service of the foregoing order and the receipt of a copy thereof is hereby admitted this 31st day of August, A. D. 1904.

J. C. KELLUM,

Attorney for Appellee.

Entered Aug. 31, 1904, in Journal 3, p. 283.

[Endorsed]: No. 1124. United States Circuit Court of Appeals for the Ninth Circuit. Robert H. Fleming vs. Reuben B. Daigle. Order Extending Time to Docket Cause. Filed Oct. 8, 1904. F. D. Monckton, Clerk.

The United States of America,

Third Division, District of Alaska, to wit:

At a District Court of the United States for the Third Division of the District of Alaska, begun and held at the courthouse in the town of Fairbanks, Alaska, on the second Monday of June, being the thirteenth day of the same month in the year of our Lord, one thousand nine hundred and four. Present: the Honorable JAMES WICKERSHAM, District Judge.

Among others were the following proceedings, to wit:

In the United States District Court for the District of Alaska, Third Division.

ROBERT H. FLEMING,
Plaintiff,

vs.

REUBEN B. DAIGLE,
Defendant.

Complaint.

The plaintiff above named complains of the defendant, and for his cause of action alleges:

I.

That on the 16th day of June, 1903, the defendant was seised and possessed of certain real property, to wit: Hillside Claim No. Six (6), Below Discovery on Cleary Creek, in the above District and Division, containing twenty acres.

II.

That on the 16th day of June, 1903, the plaintiff and the defendant entered into an agreement in writing, dated on that day, by which the defendant agreed that he would, in consideration of the plaintiff sinking three holes to bedrock or one hole to bedrock and a drift of sixty feet, on the said premises duly convey to the plaintiff a divided one-half interest in and to the said mining claim, to wit, the upper half, in consideration whereof the plaintiff agreed to perform such work, the said agreement thereafter being duly filed for record and re-

corded in the office of the recorder at Fairbanks, Alaska, in volume III of Deeds, at page 55, which said agreement is in the words and figures following, viz.:

Fairbanks Dis., June 16, 1903.

Known to all persons by these presents that I, Reuben B. Daigle, do agree to transfer and deliver a Bill of Sale to R. H. Fleming for a divided ½ one-half interest of Hillside Claim No. 6 Below Discovery on Cleary Creek, a tributary of Chat-Ne-Ka, namely the upper half for the consideration of the following Design work, on the lower line of above said claim, namely, that they will be 3 Holles Sunk to bedrock or one hole to bedrock and a drift of 60 ft. this work is to be commenced on or before the first day of July, 1903, & completed on or before the first day of February, 1904.

REUBEN B. DAIGLE.

R. H. FLEMING.

(Signed) D. W. TRUITT.

III.

That the plaintiff duly performed all the conditions of the said agreement to be by him kept and performed previous to the time fixed in the said agreement for the performance thereof.

IV.

That subsequently to the performance by the plaintiff of the said work as by him agreed he demanded from the defendant a conveyance of said interest in said premises, and requested the said defendant specifically to perform his agreement to convey to the plaintiff said

one-half interest in said placer mining claim, but that defendant refused and ever since has refused and still refuses so to do.

V.

That long prior to the commencement of this action the defendant took possession of the said property and still occupies and withholds the same from plaintiff.

VI.

That the defendant has not executed a conveyance to the plaintiff.

Wherefore the plaintiff prays judgment against the defendant as follows:

1. That the agreement so made between the plaintiff and the defendant hereinbefore set out may be specifically performed, and that the defendant be required to convey said interest in said placer mining claim to the plaintiff, and to execute a good and sufficient deed therefor to him of said property.

2. For his costs and disbursements herein, including a reasonable attorney's fee, and for such other and further relief as may be deemed by the Honorable Court to be just and equitable.

By His Attorneys,

CLAYPOOL & COWLES.

District of Alaska, }
Fairbanks Precinct. } ss.

Robert H. Fleming, being by me first duly sworn, on his oath says: That he is the plaintiff in the foregoing

action, that he has read the complaint, knows the contents thereof, and that the same is true of his own knowledge.

ROBERT H. FLEMING.

Subscribed and sworn to before me this 25th day of April, 1904.

[Notarial Seal] JAMES TOD COWLES,
Notary Public for Alaska.

Filed in the U. S. Court, District of Alaska, 3rd Division. Apr. 25, 1904. A. R. Heilig, Clerk. By John L. Long, Deputy.

In the United States District Court for the District of Alaska, Third Division.

ROBERT H. FLEMING, Plaintiff,
vs.
REUBEN B. DAIGLE, Defendant. } No. 156.

Answer.

Comes now the defendant in the above cause of action, and for his defense, admits, denies and alleges:

Admits all of the allegations contained in paragraphs one and two in the complaint in said action.

But denies that the plaintiff performed the conditions of the contract as set forth in paragraph two of said complaint.

Wherefore the defendant prays that the above action be dismissed and that he have judgment for his costs in this behalf expended.

J. C. KELLUM,
Attorney for Defendant.

United States of America, }
Alaska District. } ss.

Reuben B. Daigle, being first duly sworn, deposes and says: That he is the defendant in the above cause of action, that he has read the foregoing answer, and knows the contents thereof, and that the same is true.

REUBEN B. DAIGLE.

Subscribed and sworn to before me this 17th day of June, 1904.

[Notarial Seal] J. C. KELLUM,
Notary Public.

I hereby accept service of copy of above answer.

CLAYPOOL & COWLES,
Attys. for Plaintiff.

Filed in the U. S. Court, District of Alaska, 3rd Division. Jun. 17, 1904. A. R. Heilig, Clerk. By ———, Deputy.

(Testimony of Robert H. Fleming.)

A. About 50 feet.

Q. And the second hole?

A. Some deeper; something like 60 feet.

Q. And the third hole?

A. I think about 70 feet; I didn't measure the holes, but as you went up the hill they were a little deeper.

Q. After having performed the work, as you had agreed to do with Fleming, what did you do, if anything, with reference to it?

A. Asked him to give me a half interest for performing the work.

Q. What did he do about that?

A. He didn't do anything; before that he told me that he would give me I think it would be about four hundred feet.

Q. Did he give you a half interest?

A. Never did.

Q. He refused to do so?

A. Yes, sir; he refused to do so.

Cross-examination.

(By Mr. KELLUM.)

Q. You staked a fraction off this claim, didn't you?

A. Yes, sir.

Q. About when? A. I think it was in July.

Q. About what time in July?

A. About the 20th, somewhere along there.

Q. And recorded it? A. Yes, sir.

(Testimony of Robert H. Fleming.)

Q. After you had made this contract?

A. Yes, sir.

Q. How many feet off from the corner stake did you claim up?

A. One hundred and forty feet up towards the center stake.

Q. And from the upper stake of your fraction to Daigle's center stake, how many feet is that?

A. I could not tell you that exactly.

Q. How did you go to see if there was a fraction there?

A. I stepped it; Mr. Hastings told me about it, that there was one between 5 creek and 5 side, and he told me there was a fraction there, and he says if you will stake 140 feet then you will have lots.

Q. If this plat here represents the claim, that is about your fraction, right in there, is it not?

A. If there is that much, I don't think there is anyways near as much as that, because the claim is between 80 and 90 feet short, and I thought if there was any fraction I would stake enough.

Q. That was after you had made the contract with him?

A. After I made the contract and sunk the hole 36 or 37 feet.

Q. You claim to own that fraction?

A. I claim to own the fraction that was there; I think I ought to have it.

(Testimony of Robert H. Fleming.)

Q. Did you ever try to get Mr. Daigle to accept that hole as part of the work done on that contract?

A. I was in doubt as to whether it was on the fraction or on the claim, and he said it would not go, if was on the fraction.

Q. Did you try to get him to take it?

A. No, sir.

Q. Did you offer him that if he—Daigle—would accept this as one of the three holes that you were to put to bedrock that you would give him half of the fraction?

A. No, sir; he asked me if I would give him a half interest in it if he would accept the hole.

Q. And you refused to do it?

A. I refused to do it.

Q. On the 30th of November at Chena, or aobut the 1st or 2d of October, did Mr. Daigle notify you that he considered there was no work done yet on number six?

A. I think there was some talk of that kind.

Q. You admitted that there was not?

A. I did no such thing.

Q. Didn't he notify you that he would not accept that hole on the fraction?

A. Yes, sir, he notified me that he would not accept the hole on the fraction.

Q. Did he say anything to you at that time about sinking three holes on the claim instead of on the fraction?

A. He said the three holes had to be on the claim, certainly he did.

(Testimony of Robert H. Fleming.)

Q. Didn't you say, in the presence of Mr. Duncan, to Mr. Daigle, that you would give him half of the fraction if he would accept the hole?

A. No, sir, I didn't say that. Duncan is here, I guess so, you can get him.

Q. Do you know anything about Mr. Daigle asking the men that you had subcontracted to sink the hole, to sink it somewhere where it would be of advantage to him? A. I didn't hear anything of that kind.

Q. You are positive? A. Yes, sir.

Redirect Examination.

(By Mr. CLAYPOOL.)

Q. Can you indicate on this map where those holes are? A. That is a kind of hard matter.

(By the COURT.)

He can prepare a new plat and it can be introduced in evidence.

(By Mr. CLAYPOOL.)

Very well, we will do that.

JOSEPH RILEY, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. You may state your full name.

A. Joseph Riley.

Q. Do you know Mr. Fleming, the plaintiff in this case? A. Yes, sir.

(Testimony of Joseph Riley.)

Q. Do you know Mr. Daigle, the defendant?

A. I know Mr. Daigle to see him.

Q. Know him by sight? A. Yes, sir.

Q. Have you done any work on claim Number 6 Below, the bench of Cleary? A. Yes, sir.

Q. What work did you do there?

A. We finished sinking a hole to bedrock.

Q. Where was the hole—on what portion of the claim?

A. In the lower corner, near the lower line.

Q. How deep was it?

A. Somewhere in the neighborhood of 30 or 40 feet; I don't know exactly.

Q. You went to bedrock?

A. Went to bedrock; it was somewhere between 40 and 50 feet to bedrock.

Q. Is that the only hole you worked in?

A. Yes, sir.

Q. Do you know anything of the others?

A. I went down the others.

Q. Were they to bedrock?

A. Yes, sir; they were both to bedrock.

Q. They were both on the claim? A. Yes, sir.

(By the COURT.)

Is either of these holes now being testified to, one of the holes in controversy in the case this morning?

Mr. CLAYPOOL.—Oh, no.

(Testimony of Joseph Riley.)

Cross-examination.

(By Mr. KELLUM.)

Q. What do you say the depth of these holes was; numbering from the creek up towards the holes; how deep was the shaft of No. 1?

A. Somewhere between 40 feet and 50 feet; maybe 45 feet.

Q. Were you down to examine the bedrock?

A. I put them down myself.

Q. Number 2—how deep was that?

A. I don't just remember now; something like 50 feet; something over 50 feet.

Q. And Number 3?

A. Somewhere near 60 feet.

Q. You got through to bedrock?

A. I was at the bottom of all the holes; yes, sir.

Q. Number 1 hole—how deep was that when you commenced on it?

A. Somewhere between 30 and 40 feet.

Q. What time was it that you commenced?

A. Somewhere near the 15th of January; between the 10th and 15th; somewhere about that time; it was near the beginning of that cold snap, if you remember it.

Q. Do you know who had sunk the hole that far?

A. I don't know; I was told.

Q. How much deeper did you make it?

A. Somewhere in the neighborhood of 10 or 12 feet.

No redirect examination.

GILBERT McINTYRE, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. You may state your name.

A. Gilbert McIntyre.

Q. You are acquainted with the plaintiff, Mr. Fleming? A. Yes, sir.

Q. And with the defendant, Mr. Daigle?

A. Slightly.

Q. Are you acquainted with the property known as Six Below Discovery on Cleary Creek, the bench?

A. The bench—yes, sir.

Q. Have you done any work on that property?

A. Yes, sir.

Q. At whose instance or request?

A. Mr. Fleming's.

Q. What did you do?

A. I helped sink three holes to bedrock.

Q. When was that?

A. I commenced work on the 12th day of Dceember, and finished on the 28th day of January.

Cross-examination.

(By Mr. KELLUM.)

Q. Did you reach bedrock? A. Yes, sir.

Q. On how many holes? A. Three holes.

Q. All three holes you put to bedrock?

A. Yes, sir.

Q. Who helped you?

(Testimony of Gilbert McIntyre.)

A. Mr. Richardson, Mr. Dunn, and Mr. Riley.

Q. You are familiar with bedrock on Cleary?

A. Slightly.

Q. And you positively say that these holes were down to bedrock? A. Yes, sir.

ROBERT DUNN, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. Robert Dunn.

Q. What is your business? A. Mining.

Q. Are you acquainted with the plaintiff, Mr. Fleming? A. Yes, sir.

Q. Do you know the property described as Number 6 Below on Cleary Creek, bench claim?

A. Yes, sir.

Q. Have you done any work there?

A. Yes, sir.

Q. When? A. Last winter; January, I guess.

Q. What did you do?

A. I helped sink two holes.

Q. How far down did you go with them?

A. About 60 feet; near that.

Q. Did you or did you not go to bedrock with the two holes? A. We went to bedrock.

(Testimony of Robert Dunn.)

Cross-examination.

(By Mr. KELLUM.)

Q. In how many holes did you go to bedrock?

A. Two holes, sir.

Q. Which of the holes were they with reference to the corner stake?

A. Two and three, next to the creek.

Q. How deep were they?

A. In the neighborhood, I think, of about 60 feet.

Q. You are familiar with bedrock?

A. Yes, sir.

Q. You know when you strike bedrock?

A. Yes, sir.

Q. You are sure these holes were to bedrock?

A. Yes, sir.

Q. Did you do any work at all in hole Number 1?

A. No, sir.

Q. That is, the first hole from the corner?

A. No, sir.

Redirect Examination.

(By Mr. CLAYPOOL.)

Q. Did you examine Number 1 hole at all?

A. I examined the bedrock on the surface.

Q. Then there was bedrock brought up?

A. Yes, sir.

(By the COURT.)

Gentlemen, I want to ask a question in this matter;

(Testimony of Robert Dunn.)

does Mr. Fleming claim a fraction off this claim in controversy?

Mr. FLEMING.—Yes, sir, I claim a small fraction.

Mr. CLAYPOOL.—On the side, but none of these holes are on that.

Mr. KELLUM.—Oh, I beg your pardon; they are; that is Mr. Fleming's evidence.

The COURT.—Mr. Fleming may take the stand to explain this.

(Mr. Fleming takes the witness-stand.)

Mr. FLEMING.—I don't claim that the hole is on the fraction; I claim it is on Mr. Daigle's ground.

Mr. CLAYPOOL.—You claim none of the ground on which the hole is sunk?

Mr. FLEMING.—No, sir, it is inside his stakes 60 or 80 feet.

The COURT.—It is within the limits; inside of his stakes 60 or 80 feet; is it inside the distance that you claim, inside on your location notice?

Mr. FLEMING.—I found I had located the fraction too large.

The COURT.—Did you move your stakes?

Mr. FLEMING.—No, sir.

The COURT.—They are where they were originally set?

Mr. FLEMING.—Yes, sir; they are.

(Testimony of Robert Dunn.)

The COURT.—And do not include the hole in question?

Mr. FLEMING.—It covers that hole.

The COURT.—One of those three holes that you claim to have done for him?

Mr. FLEMING.—Yes, sir, on the fraction; it is on his ground.

Mr. CLAYPOOL.—Do you or do you not claim any of the ground on which these three holes are situated?

Mr. FLEMING.—No, sir, I don't; no, I don't; it is on Daigle's ground.

The COURT.—What I ask you is this: Is that hole within your stakes?

Mr. FLEMING.—Yes, the stakes I put down when I staked the fraction.

The COURT.—When did he relinquish it?

Mr. CLAYPOOL.—He will do that now.

The COURT.—Well, it is a question whether he can at this time. Go ahead, gentlemen.

(By Mr. KELLUM.)

Q. Did you ever have any conversation with Mr. Daigle about coming to a conclusion or understanding as to where his corner stake was, measuring from his center stake down?

A. I don't know where his center stake is; I know

(Testimony of Robert Dunn.)

where his lower corner is; there is only one stake on the ground that I can read the notice on.

Q. That stake has usually been considered as the center stake on the dividing line between 6 and 7; have you ever measured or anyone else, 330 feet from there?

A. Yes, sir.

Q. Has not that been considered as the corner stake of Daigle's claim?

A. No, it is now, but it was not when I went on the ground.

Q. Was it not at that time you had this conversation?

A. No, sir, it was not marked at that time.

(By the COURT.)

Q. In the other case this forenoon, it appeared that the plaintiff there had staked a fraction, but in that case he had abandoned the fraction and the contract was made in writing afterward; now, I want to know when this contract was made with regard to the staking of this fraction.

A. The contract was made long before.

(By Mr. KELLUM.)

Q. Measuring down here on this plat: the surveyor has called this your fraction down here, 117 feet, which includes one shaft—

A. I would like to ask the distance of the claim.

Q. Twelve hundred and twenty-three feet. These are your stakes here?

A. I would not say exactly.

(Testimony of Robert Dunn.)

(By the COURT.)

Q. When did you stake this fraction?

A. In the latter part of July last year, I think.

Q. When did you put this hole down on this fraction?

A. I was down 36 or 37 feet before I knew there was any ground vacant there, any excess.

Q. Did you make any other discovery on that fraction except that hole?

A. No, I didn't; never did.

Q. Did you make a discovery in that hole. in that shaft? A. There was gold there; yes, sir.

JOHN ANDERSON, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. John Anderson.

Q. Do you know the plaintiff, Mr. Fleming?

A. Yes, sir.

Q. Do you know the property described at 6 Below, the bench on Cleary? A. Yes, sir.

Q. Do you know anything about the work that has been done there?

A. I was there when the work was done.

Q. What work has been done?

A. Three holes sunk to bedrock.

Q. By whom?

(Testimony of John Anderson.)

A. By Mr. Fleming; well, not by him, but by his agents.

Q. His agents and employees? A. Yes, sir.

Cross-examination.

(By Mr. KELLUM.)

Q. All those holes were put to bedrock?

A. Yes, sir.

GEORGE W. RICHARDSON, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name?

A. George W. Richardson.

Q. Are you acquainted with the claim in controversy?

A. I am.

Q. Do you know what work has been done there?

A. Yes, sir, three holes sunk to bedrock.

Q. By whom?

A. By Mr. Fleming and his agents, the parties working for him; I helped to sink one hole.

Cross-examination.

(By Mr. KELLUM.)

Q. Have you any interest in the claim, Mr. Richardson? A. I am supposed to get an interest.

Q. They are to bedrock? A. Yes, sir.

Q. All the three? A. Yes, sir.

SAMUEL WISE, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. State your full name.

A. Samuel Wise.

Q. Mr. Wise, are you acquainted with the property known as Number 6 below, the bench on Cleary?

A. Yes, I know where it is located.

Q. Are you acquainted with Mr. Fleming, the plaintiff in this case? A. Yes, sir.

Q. Do you know what work has been done up there?

A. Yes, sir.

Q. Have you made any examination of it?

A. Yes, sir.

Q. Are you interested in this case in any way?

A. None whatever, not in any way.

Q. You may state what examination you did make.

A. I was down in two shafts and examined the bedrock.

Q. With reference to the corner, which two shafts?

A. The first and second shaft from the creek, I think.

Q. How deep are those holes?

A. I couldn't say exactly, 50 or 60 feet.

Q. Was there bedrock there? A. Yes, sir.

REUBEN B. DAIGLE, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KELLUM.)

Q. You are the defendant in this cause?

A. Yes, sir.

Q. Does this map represent the claim Number 6, the one that you have sold?

A. Yes, sir, I understand this to be it.

Q. Did you ever have any conversation with Mr. Fleming about a fraction he had located and recorded prior to that—well, at any time along in the fall?

A. Yes, sir.

Q. You may state what the conversation was.

A. It was in September; it was somewheres near the last of September; I came over from Fairbanks and went down Chatham; I met Mr. Fleming and asked him if he had anyone there on the ground working it, as I understood him some time in August that he had abandoned this hole on the fraction and claimed it, and so I was anxious to have the work carried on so I could go to work in the winter; I wanted to see if I could get him to do the work; although he had his time till February; and he said that he had sunk this hole on the fraction and wanted me to accept that as one of the three holes, and I told him that I would not, and he said, "If you will accept that hole I will give you a divided half-interest in the fraction, provided there is no gold in it, for you to dump your tailings on; that was

(Testimony of Reuben B. Daigle.)

in the presence of John Duncan; then the 2d day of October down at Chena, he was down there and we was speaking about this fraction hole question and he wanted me to accept it again and was making insinuations that there would be work done—

Q. Well, never mind that; state what he said.

A. He said I would have the advantage of seven holes instead of six; because the men on 7 was going to sink some holes, and I told him I wanted three holes on 6, and I told him I wouldn't accept this hole on the fraction.

Q. You recognized that as his hole?

A. I certainly did, that it was his, he staked and recorded, and claimed it himself; I understood that he hadn't a hole to bedrock, and if there was no gold in the fraction he would give me a half interest.

Q. Was this said in the presence of anybody else?

A. At Chena just Walter Knott; I told him I would not accept this hole on the fraction and I wanted him to go ahead and sink three holes on the claim as he had contracted to do, and that was all; we was talking and chewing the rag and he said if he had sunk three holes I would really have the advantage of seven holes and I told him I didn't care about that; if he had sunk three holes he might go up.

Q. You only claimed down to that stake?

A. Thirty-three feet from the center stake is all I ever claimed.

(Testimony of Reuben B. Daigle.)

Cross-examination.

(By Mr. CLAYPOOL.)

Q. Does not your notice read that you claimed 20 acres? A. No, sir.

Q. Do you remember how it does read?

A. It has been two and a half years since I staked it; I could not very well give a correct statement.

Q. Well, what is your recollection of what you claimed; what your measurements are?

A. My recollections are 1320 down stream and 330 on each side of this center stake.

(By Mr. KELLUM.)

Q. You own that claim at the present time?

A. No, sir.

(By Mr. CLAYPOOL.)

Q. Is this hole that you speak about now within your stakes? A. What hole?

Q. Are not they all inside your original stakes?

A. I presume they are, probably.

Q. Are they or are they not?

A. The stakes is out here; the original stakes is shown here on the map.

Q. The holes are all inside those?

A. They appear to be, yes, sir.

Q. Do you know how much ground was included in the ground embraced in your original stakes?

A. I don't.

(Testimony of Reuben B. Daigle.)

Q. What does it show from that map, fraction and all? A. You can look at it yourself.

Mr. CLAYPOOL.—Eighteen and five-tenths and three and eighteen one-hundredths; over 21 acres, is it not?

Mr. KELLUM.—I will ask that the Commissioner bring in the recorded notice of Mr. Fleming's claim.

Mr. CLAYPOOL.—It is admitted.

The COURT.—It may be read into the record.

(Mr. Kellum reads:) "July 14, 1903, Number 6 Below Cleary Creek, I claim 1320 feet down stream and 140 feet wide off Number 6 hillside and adjoining Number 6 Creek Claim. R. H. Fleming. Filed for record July 24, 1903, at 10:30 A. M. Chas. Ethelbert Claypool, Commissioner and ex-officio Recorder, by J. T. Cowles, Deputy."

The COURT.—Where is it recorded, Mr. Kellum?

Mr. KELLUM.—In volume 3 of Locations, page 233.

The COURT.—In what precinct?

Mr. KELLUM.—From the record in the office of the Fairbanks Recording District, District of Alaska.

J. H. JOSLIN, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KELLUM.)

Q. Did you make this map from notes you made at the time? A. Yes, sir.

(Testimony of J. H. Joslin.)

Q. You may state whether this is an accurate survey of this claim. A. Yes, sir.

Q. What is the distance from the lower corner stake to the corner stake as admitted?

A. I make it 117 feet.

(By the COURT.)

Q. How far is that point that you make 117 feet from the center line of the claim?

A. I measured 330 feet and established a corner and then 117 feet on down to what appeared to be the old original stake—what I took to be and what was pointed out to me as the original stake of the claim; instead of staking 330 he staked 330 plus 117.

Q. Is that the stake of the fraction up there?

A. Yes, sir.

Q. Whose stake is that?

A. Well, I don't remember that, as to whose stake it is; it is a fraction stake there, but the marks are generally illegible and I didn't make any memorandum as to that; it was the fraction stake pointed out to me; there is a line blazed and cut through there; and this was pointed out as being the fraction stake.

Q. How many acres are there in the fraction?

A. Approximately three and eighteen-hundredths.

(By Mr. KELLUM.)

Q. The lower corner stake on the line—was that established by Fleming or Daigle? I mean this line here.

A. I established a corner there.

(Testimony of J. H. Joslin.)

Q. It was also established before?

A. There is a corner established here by someone, over near this; I didn't establish it in my line; it was out of the line with my line.

Q. And that fraction that you measured, out here, contains that shaft, does it not? A. Yes, sir.

Cross-examination.

(By Mr. CLAYPOOL.)

Q. What is the acreage comprised within the original stake, the fraction included?

A. Something over 20 acres, 21 and a fraction.

In the United States District Court for the District of Alaska, Third Division.

R. H. FLEMING,
Plaintiff,
vs.
REUBEN B. DAIGLE,
Defendant.

Motion.

Now on this 25th day of July, 1904, at 10:00 o'clock A. M., comes the plaintiff by his attorneys and moves the Court to be allowed to recall defendant's witness, J. H. Joslin, and offers to show by said J. H. Joslin on cross-examination the identification of a certain plat concerning which the said Joslin testified at the hearing hereof, purporting to be a plat made from actual survey

of the claim in controversy herein, and to show further by said witness on cross-examination the distance from the original lower corner stake to the hole referred to in the testimony and known as Shaft No. 1, sunk by plaintiff. Or in other words, to show the distance from said hole to the lower stake of defendant as established by him upon his restaking said claim.

Said plaintiff further states that the object of said testimony is to show that said Shaft No. 1 is within the twenty acre limit of said claim.

Plaintiff further moves the court that he be allowed to introduce in evidence pages 519, 520 and 521 of vol. 1 of the Record of Deeds of the Fairbanks Recording District, District of Alaska, for the purpose of proving that defendant at the time of the commencement of this action claimed to own and possess the property in controversy herein.

And the defendant appearing by his counsel J. C. Kellum, in pursuance of notice heretofore given and the Court hearing argument of counsel herein and being advised in the premises, overruled said motion upon the grounds that the evidence tendered and each and every part thereof is immaterial to the issues in this cause. To which ruling plaintiff then and there excepted which exceptions were allowed by the Court.

JAMES WICKERSHAM,

Judge.

In the United States District Court for the District of Alaska, Third Division.

ROBERT H. FLEMING,
Plaintiff,

vs.

REUBEN B. DAIGLE,
Defendant.

Order Settling Bill of Exceptions.

Now on this 30th day of August, 1904, comes the plaintiff, Robert H. Fleming, by his attorneys, Messrs. Claypool, Stevens and Cowles, and the defendant by his attorney, J. C. Kellum, Esq., also comes, and the said plaintiff presents his statement of facts and bill of exceptions for settlement herein on his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, which bill of exceptions consists of the foregoing typewritten pages of the proceedings and testimony of witnesses given by the respective parties at the trial of said cause in this court as well as the exhibits and bill of exceptions, motions and orders of court, all hereto attached. And there being no objections thereto upon the part of the said defendant, and no amendments proposed thereto, and the same being all of the evidence, orders, motions, and proceedings in said cause not of record, and the same being correct and true; and inasmuch as the same does not appear of record in said action, and is hereby approved, allowed and settled, the same and the whole thereof is hereby made a part of the record herein.

Done within the time allowed and by the Judge who tried said cause.

JAMES WICKERSHAM,
Judge of Said Court.

O. K.—J. C. KELLUM.

In the United States District Court for the District of Alaska, Third Division

ROBERT H. FLEMING, Plaintiff,
vs.
REUBEN B. DAIGLE, Defendant. } No. 156.

Findings of Fact and Conclusions of Law Proposed by Plaintiff.

The plaintiff above-named requests the Court to find herein the following facts and conclusions of law, and makes each request separately:

First.

That on the 16th day of June, 1903, the defendant was the owner of and possessed of that certain placer mining claim known as the Hillside Claim, Number Six (6) Below Discovery on Cleary Creek, in the Fairbanks Mining District, District of Alaska, and containing twenty (20) acres.

Second.

That at the time of the commencement of this suit the defendant owned and possessed that certain placer mining claim situate in the Fairbanks Mining District, Dis-

trict of Alaska, known as the Hillside Claim, Number Six (6) Below Discovery on Cleary Creek, in said Fairbanks Mining District, District of Alaska.

Third.

That on the 16th day of June, 1903, the plaintiff and the defendant entered into an agreement in writing wherein defendant agreed to convey to plaintiff the upper one-half ($\frac{1}{2}$) of Hillside Claim Number Six (6) Below Discovery on Cleary Creek in the Fairbanks Mining District, District of Alaska, in consideration of which plaintiff had the option of sinking three (3) holes to bedrock on said claim, or sinking one (1) hole to bedrock and running a drift of sixty feet (60); that said work should be commenced on or before July 1st, 1903; and completed on or before February 1st, 1904.

Fourth.

That plaintiff, on or before July 1st, 1903, entered upon the claim in controversy and partially sunk one hole within the boundaries of said claim, as heretofore staked by defendant; that afterward and on or about the ——— day of July, 1903, plaintiff staked the lower one hundred and seventeen (117) feet of said claim as a fraction, which fractional location as staked included the first hole sunk by plaintiff.

Fifth.

That afterward, and on or about the 2d day of October, 1903, defendant requested plaintiff to complete the sinking of the three (3) holes required by his said contract, which was by plaintiff complied with by there-

after, and upon the first day of January, 1904, completed by sinking first hole to bedrock and by sinking second hole to bedrock upon defendant's claim.

Sixth.

That the first hole sunk by plaintiff is, as a matter of fact, on the claim of defendant and within the limits of twenty acres (20), which was claimed by the defendant in his location of said claim.

Seventh.

That plaintiff, on or before the completion of the three holes provided for in said contract abandoned all claims under his fractional location, to any part of the (20) twenty acres contained in defendant's location.

Eighth.

That defendant after the completion of the sinking of the three holes by plaintiff, under his contract, caused his said claim to be surveyed and reduced the limits of said claim from twenty-one (21) acres, as originally staked, to eighteen and a half (18½) acres, and established the limits of such reduced claim by excluding therefrom the first shaft sunk by the plaintiff.

Ninth.

That plaintiff never claimed any portion of defendant's original location, excepting as to the excess of twenty (20) acres.

Tenth.

That prior to the commencement of this suit plaintiff

demanded of defendant a conveyance of the upper one-half (½) of said claim.

_____,

Judge.

THE CONCLUSIONS OF LAW.

Plaintiff requests the following conclusions of law:

First.

That plaintiff performed all of the conditions of his agreement with defendant to be performed under its terms.

Second.

That defendant refused to convey the upper one-half (½) of said claim Number Six (6) upon request of plaintiff, but fraudulently reduced the limits of his claim for the purpose of defeating the rights of plaintiff.

Third.

That plaintiff is entitled to prevail herein and to a decree of this Court decreeing the specific performance of the above-mentioned contract, and to a conveyance of the upper one-half (½) of the claim in controversy.

_____,

Judge.

Filed in the U. S. Court, District of Alaska, 3d Division. July 26, 1904. A. R. Heilig, Clerk. By _____, Deputy.

United States District Court, Third Division, District of Alaska.

FLEMING
vs. } No. 156.
DAIGLE.

Refusal of Court to Sign Findings Presented by Plaintiff.

And now, to wit, July 26, 1904, comes the plaintiff and presents to the Court findings of fact and conclusions of law which he requests the Court to make and sign; and the Court having duly considered the same, refuses to make and sign such findings and conclusions; to which plaintiff excepts and an exception is allowed.

Entered July 26, 1904, in Journal 3, page 194.

In the United States District Court, Third Division, District of Alaska.

ROBERT H. FLEMING, Plaintiff,
vs. } No. 156.
REUBEN B. DAIGLE, Defendant.

Findings of Fact and Conclusions of Law.

This cause having been called regularly for trial before the Court, Messrs. Claypool and Cowles, appeared as attorneys for plaintiff, and Mr. J. C. Kellum, appeared as attorney for defendant. And the Court having heard the proofs of the respective parties, and considered the

same, and the records and papers in the cause, and the argument of the respective attorneys therein, and the cause having been submitted to the Court for its decision, the Court now finds the following facts:

I. That the plaintiff and the defendant entered into a written agreement whereby the plaintiff was to perform certain work, to wit, sink three holes to bedrock on Bench Placer Mining Claim, Number Six, Below Discovery on Cleary Creek, right limit, in the Fairbanks Mining and Recording District, Alaska District, and when said three holes were sunk to bedrock, then the defendant was to make, execute and deliver to the plaintiff a good and sufficient deed to one-half interest in and to said mining claim.

II. That the said plaintiff did not sink three holes to bedrock on said bench placer mining claim, as he had agreed to do.

As conclusions of law from the foregoing facts, the Court now hereby finds and decides:

I. That the plaintiff is entitled to no part of said claim, under or by virtue of said agreement.

That the defendant is entitled to a judgment for costs to be taxed against said plaintiff.

And judgment is hereby ordered to be entered against plaintiff accordingly.

JAMES WICKERSHAM,
Judge.

Filed in the U. S. Court, District of Alaska, 3d Division. July 26, 1904. A. R. Heilig, Clerk. By ———, Deputy.

In the United States District Court, Third Division, District of Alaska.

ROBERT H. FLEMING,
Plaintiff,

vs.

REUBEN B. DAIGLE,
Defendant.

Judgment.

This cause coming on regularly for trial on the 22d day of July, 1904, Messrs. Claypool and Cowles, appearing as counsel for plaintiff, and Mr. J. C. Kellum for the defendant. The cause was tried before the Court without a jury, whereupon witnesses upon the part of the plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by respective parties, and the evidence being closed, the cause was submitted to the Court for consideration and decision; and after due deliberation thereon, the Court finds its findings and decision in writing, and orders that judgment be entered herein in favor of the defendant in accordance therewith.

Wherefore by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff, Robert H. Fleming, take nothing by his said action, and that he has no right, title or interest in and to the said claim in dispute, or any part thereof, to wit, Bench Placer Mining Claim Number Six, on the Right Limit, below Discovery, on Cleary Creek, in the Fairbanks Mining and Recording District, Alaska District, and that

the defendant do have and recover of and from the said plaintiff his costs and disbursements incurred in this action, amounting to the sum of $———.

Judgment rendered July 26, 1904.

JAMES WICKERSHAM,
Judge.

Entered July 26, 1904, in Journal 3, p. 191.

In the United States District Court for the District of Alaska, Third Division

ROBERT H. FLEMING, Plaintiff,
vs.
REUBEN B. DAIGLE, Defendant.

Assignment of Errors.

Comes now the plaintiff, Robert H. Fleming, and files herein the following assignment of errors upon which he relies:

I.

The Court erred in refusing to find as requested by plaintiff in plaintiff's proposed findings of fact:

"That on the 16th day of June, 1903, the defendant was the owner of and possessed of that certain placer mining claim known as the Hillside Claim Number Six Below Discovery on Cleary Creek, in the Fairbanks Mining District, District of Alaska, and containing twenty acres."

II.

That the Court erred in refusing to find as requested by plaintiff in paragraph II of plaintiff's proposed findings of fact, as follows:

"That at the time of the commencement of this suit the defendant owned and possessed that certain placer mining claim situate in the Fairbanks Mining District, District of Alaska, known as the Hillside Claim Number Six Below Discovery on Cleary Creek in said Fairbanks Mining District, District of Alaska."

III.

That the Court erred in refusing to find as requested by plaintiff in his proposed findings of fact, as follows:

"That on the 16th day of June, 1903, the plaintiff and defendant entered into an agreement in writing, wherein defendant agreed to convey to plaintiff the upper one-half of Hillside Claim Number Six Below Discovery on Cleary Creek in the Fairbanks Mining District, District of Alaska, in consideration of which plaintiff had the option of sinking three holes to bedrock on said claim, or sinking one hole to bedrock and running a drift of sixty feet; that said work should be commenced on or before July 1, 1903; and completed on or before February 1, 1904."

IV.

That the Court erred in refusing to find as requested by plaintiff as set forth in paragraph IV of plaintiff's proposed findings in said cause, as follows:

"That plaintiff, on or before July 1, 1903, entered upon the claim in controversy and partially sunk one hole

within the boundaries of said claim, as heretofore staked by defendant; that afterward and on or about the ——— day of July, 1903, plaintiff staked the lower one hundred and seventeen feet of said claim as a fraction, which fractional location as staked completed the first hole sunk by plaintiff."

V.

That the Court erred in refusing to find as requested by plaintiff in paragraph 5th of his proposed findings of fact, as follows:

"That afterwards and on or about the 2d day of October, 1903, defendant requested plaintiff to complete the sinking of the three holes required by his said contract, which was by plaintiff complied with by thereafter, and upon the 1st day of January, 1904, completed by sinking the first hole to bedrock and by sinking the second hole to bedrock upon defendant's claim."

VI.

That the Court erred in refusing to find as requested by plaintiff in paragraph VI of plaintiff's proposed findings of fact, as follows:

"That on the first hole sunk by plaintiff is, as a matter of fact, on the claim of defendant, and within the limits of twenty acres which was claimed by the defendant in his location of said claim."

VII.

That the Court erred in refusing to find, as requested by plaintiff, in the 7th paragraph of plaintiff's proposed findings of fact, as follows:

"That plaintiff, on or before the completion of the three holes provided for in said contract, abandoned all claims under his fractional location to any part of the twenty acres contained in defendant's location."

VIII.

That the Court erred in refusing to find as requested by plaintiff in the 8th paragraph of plaintiff's proposed findings of fact, as follows:

"That defendant after the completion of the sinking of the three holes by plaintiff, under his contract, caused his said claim to be surveyed, and reduced the limits of said claim from twenty-one acres as originally staked, to eighteen and one-half acres, and established the limits of such reduced claim by excluding therefrom the first shaft sunk by the plaintiff."

IX.

The Court erred in refusing to find as requested by plaintiff in paragraph 9th of plaintiff's proposed findings of fact as follows:

"That plaintiff never claimed any portion of defendant's original location, excepting as to the excess of twenty acres."

X.

That the Court erred in refusing to find as requested by plaintiff in the 10th paragraph of plaintiff's proposed findings of fact, as follows:

"That prior to the commencement of this suit plaintiff demanded of defendant a conveyance of the upper one-half of said claim."

XI.

That the Court erred in refusing to find as a conclusion of law and as requested in the first paragraph of plaintiff's proposed conclusions of law,

"That plaintiff performed all of the conditions of his agreement with defendant to be performed under its terms."

XII.

That the Court erred in refusing to find as requested by plaintiff in plaintiff's second paragraph of his proposed conclusions of law, as follows:

"That defendant in refusing to convey the upper one-half of said claim Number Six upon request of plaintiff, fraudulently reduced the limits of his claim for the purpose of defeating the rights of plaintiff."

XIII.

That the Court erred in refusing to find as a conclusion of law as requested by plaintiff in paragraph 3d of plaintiff's proposed conclusions of law:

"That plaintiff is entitled to prevail herein, and to a decree of this Court decreeing the specific performance of the above-mentioned contract, and to a conveyance of the upper one-half of the claim in controversy."

XIV.

That the Court erred in refusing to enter a decree and judgment as requested by plaintiff in accordance with plaintiff's proposed findings of fact and conclusions of law.

XV.

That the Court erred in its finding of facts as set forth in paragraph I of the finding of facts signed by said court.

XVI.

That the Court erred in its findings of fact as set forth in paragraph II of said findings of fact.

XVII.

That the Court erred in its findings of fact as set forth in paragraph III of the findings of fact herein.

XVIII.

That the Court erred in its findings of fact as set forth in paragraph IV of said findings of fact.

XIX.

That the Court erred in its conclusion of law as set forth in paragraph I of its conclusions of law.

XX.

That the Court erred in its conclusions of law as set forth in paragraph II of the conclusions of law herein.

XXI.

That the Court erred in refusing to grant plaintiff's motion filed in said cause before any findings of fact or conclusions of law were made by said Court, which motion is as follows, to wit:

"Now, on this 25th day of July, 1904, at 10:00 o'clock A. M., comes the plaintiff by his attorneys and moves the Court to be allowed to recall defendant's witness, J. H. Joslin, and offers to show by said J. H. Joslin on

cross-examination the identification of a certain plat, concerning which the said Joslin testified at the hearing hereof, purporting to be a plat made from actual survey of the claim in controversy herein, and to show further by said witness on cross-examination the distance from the original lower corner stake to the hole referred to in the testimony, and known as shaft Number One, sunk by plaintiff. Or, in other words, to show the distance from said hole to the lower stake of defendant as established by him upon his restaking said claim.

Said plaintiff further states that the object of said testimony is to show that said shaft Number One is within the twenty acre limit of said claim.

Plaintiff further moves the Court that he be allowed to introduce in evidence Pages 519, 520 and 521 of volume one of the record of deeds of the Fairbanks Recording District, District of Alaska, for the purpose of proving that defendant at the time of the commencement of this action claimed to own and possess the property in controversy herein.

And the defendant appearing by his counsel, J. C. Kellum, in pursuance of notice heretofore given, and the Court hearing argument of counsel herein, and being advised in the premises, overruled said motion upon the grounds that the evidence tendered and each and every part thereof is immaterial to the issues in this cause, to which ruling plaintiff then and there excepted, which exceptions were allowed by the Court.

JAMES WICKERSHAM,

Judge."

XXII.

That the Court erred in entering judgment herein for the reason that the same is contrary to the evidence adduced in said cause and is against the law.

CLAYPOOL, STEVENS & COWLES,
Attorneys for Plaintiff.

Filed in the U. S. Court, District of Alaska, 3rd Division. Aug. 31, 1904. A. R. Heilig, Clerk. By ———, Deputy.

In the United States District Court, District of Alaska, Third Division.

ROBERT H. FLEMING,
Plaintiff,
vs.
REUBEN B. DAIGLE,
Defendant.

Bond on Appeal.

Know all men by these presents, that we, Robert H. Fleming, of the town of Fairbanks, District of Alaska, as principal, and F. G. Manley and Geo. Roth, as sureties, are held and firmly bound unto Reuben B. Daigle in the full and just sum of one thousand dollars, to be paid to the said Reuben B. Daigle, his attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by the presents.

Sealed with our seals and dated this twenty-seventh day of July, A. D. 1904.

Whereas, lately at a term of the United States District Court for the District of Alaska, Third Division, in a suit pending in said court between the said Robert H. Fleming as plaintiff and the said Ruben B. Daigle as the defendant, wherein the said plaintiff sued for the specific performance of a contract providing for the conveyance of the upper half of hill side claim Number Six, Below Discovery on Cleary Creek in the Fairbanks Mining District, District of Alaska from the defendant, a decree was rendered against the said plaintiff in said action, and the said Robert H. Fleming is about to obtain from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the said final decree and judgment of the aforesaid suit, and a citation directed to said Reuben B. Daigle is about to be issued citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California.

Now, the condition of the above obligation is such that if the said Robert H. Fleming shall prosecute his said appeal to effect, and shall answer all damages and costs that may be awarded against him, if he fail to make his plea good and shall in all respects abide and

perform the orders and judgment of the appellate court upon his said appeal, then the above obligation is to be void; otherwise to remain in full force and virtue.

ROBERT H. FLEMING. [L. S]

F. G. MANLEY. [L. S.]

GEO. ROTH. [L. S.]

United States of America,
District of Alaska. } ss.

F. G. Manley and Geo. Roth, the persons named in and who subscribed the above and foregoing undertaking as the sureties thereto, being each severally and duly sworn, each for himself says, that he is a resident within the District of Alaska, that he is not a counselor or attorney at law, marshal, clerk of any court, or other officer of any court.

That he is worth the sum specified in the foregoing undertaking, to wit: The sum of one thousand dollars, exclusive of property exempt from execution and over and above all just debts and liabilities.

F. G. MANLEY.

GEO. ROTH.

Subscribed and sworn to before me this twenty-seventh day of July, A. D. 1904.

[Seal] MORTON E. STEVENS,

Notary Public in and for the District of Alaska.

Sufficiency of sureties on the foregoing bond approved this 30th day of Aug. 1904.

JAMES WICKERSHAM,
Judge of Said Court.

Filed in the U. S. Court, District of Alaska, 3rd Division. Aug. 31, 1904. A. R. Heilig, Clerk. By ———, Deputy.

In the United States District Court for the District of Alaska, Third Division.

ROBERT H. FLEMING, Plaintiff,

vs.

REUBEN B. DAIGLE, Defendant.

Order Allowing Appeal.

Now, on this 30th day of Aug. 1904, the same being one of the regular judicial days of the special term of this Court held at Fairbanks, District of Alaska, Third Division, this cause coming on to be heard upon the plaintiff's petition herein for an appeal, and the plaintiff appearing by his counsel, Messrs. Claypool, Stevens & Cowles, and the defendant appearing by his counsel, J. C. Kellum, Esq., and the Court being advised in the premises—

It is ordered that plaintiff's appeal in said cause to the United States Circuit Court of Appeals for the Ninth

Circuit, be, and the same is hereby allowed; and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein, be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the return day of said appeal and citation be fixed at thirty days from the date hereof, and that plaintiff shall have twenty days from this date within which to prepare and file his statement of facts and bill of exceptions herein.

It is further ordered that the bond on appeal of the said plaintiff be fixed at the sum of $1,000.00, the same when given and approved to act as a supersedeas bond as well as a bond for costs and damages on appeal.

JAMES WICKERSHAM,

Judge.

Entered Aug. 31, 1904, in Journal 3, p. 283.

In the United States District Court for the District of Alaska, Third Division.

ROBERT H. FLEMING,
Plaintiff,

vs.

REUBEN B. DAIGLE,
Defendant.

Citation.

United States of America,
District of Alaska. } ss.

The President of the United States, to Reuben B. Daigle, Esq., the Above-named Defendant, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal, made and entered in the above-entitled cause, in which Robert H. Fleming is plaintiff and appellant and said Reuben B. Daigle is defendant and appellee, to show cause, if any there be, why the decree and judgment rendered in said cause against the said plaintiff, should not be set aside, corrected and reversed, and why speedy justice should not be done to the said Robert H. Fleming in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 30th day of Aug., A. D. 1904, and of the Independence of the United States the one hundred and twenty-ninth.

[Seal] JAMES WICKERSHAM,
United States District Judge in and for the District of Alaska, Third Division.

Attest: ALBERT R. HEILIG,
Clerk.
By John L. Long,
Deputy.

Service of the within citation and the receipt of copy thereof admitted this 31st day of Aug. A. D. 1904.

J. C. KELLUM,
Attorney for Defendant and Appellee.

[Endorsed]: United States District Court for District of Alaska, 3d Div. Fleming v. Daigle. Citation. Filed in the U. S. District Court, District of Alaska, 3d Division, Aug. 31, 1904. Albert R. Heilig, Clerk. By John L. Long, Deputy.

United States District Court, Third Division, District of Alaska.

ROBERT H. FLEMING,
Plaintiff,
vs.
No. 156.
REUBEN B. DAIGLE,
Defendant.

Clerk's Certificate to Transcript.

I, Albert R. Heilig, Clerk of the United States District Court for the Third Division of the District of Alaska, hereby certify the foregoing forty-four typewritten pages, numbered from 1 to 44, inclusive, to be a full, true and correct copy of the record, bill of exceptions, assignment of errors and all proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same is in full compliance with the order of said Court allowing an appeal of said cause. That pages 45 and 46 constitute the original citation, and acceptance of service.

I further certify that the cost of the foregoing record on appeal is $18.00, and that said amount was paid by the plaintiff above named.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Eagle, Alaska, this twentieth day of September, 1904.

[Seal] ALBERT R. HEILIG,

Clerk U. S. District Court for the District of Alaska, Third Division.

[Endorsed]: No. 1124. United States Circuit Court of Appeals for the Ninth Circuit. Robert H. Fleming, Appellant, vs. Reuben B. Daigle, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Third Division.

Filed October 8, 1904.

F. D. MONCKTON,

Clerk.

No. 1124.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ROBERT H. FLEMING,
Appellant,

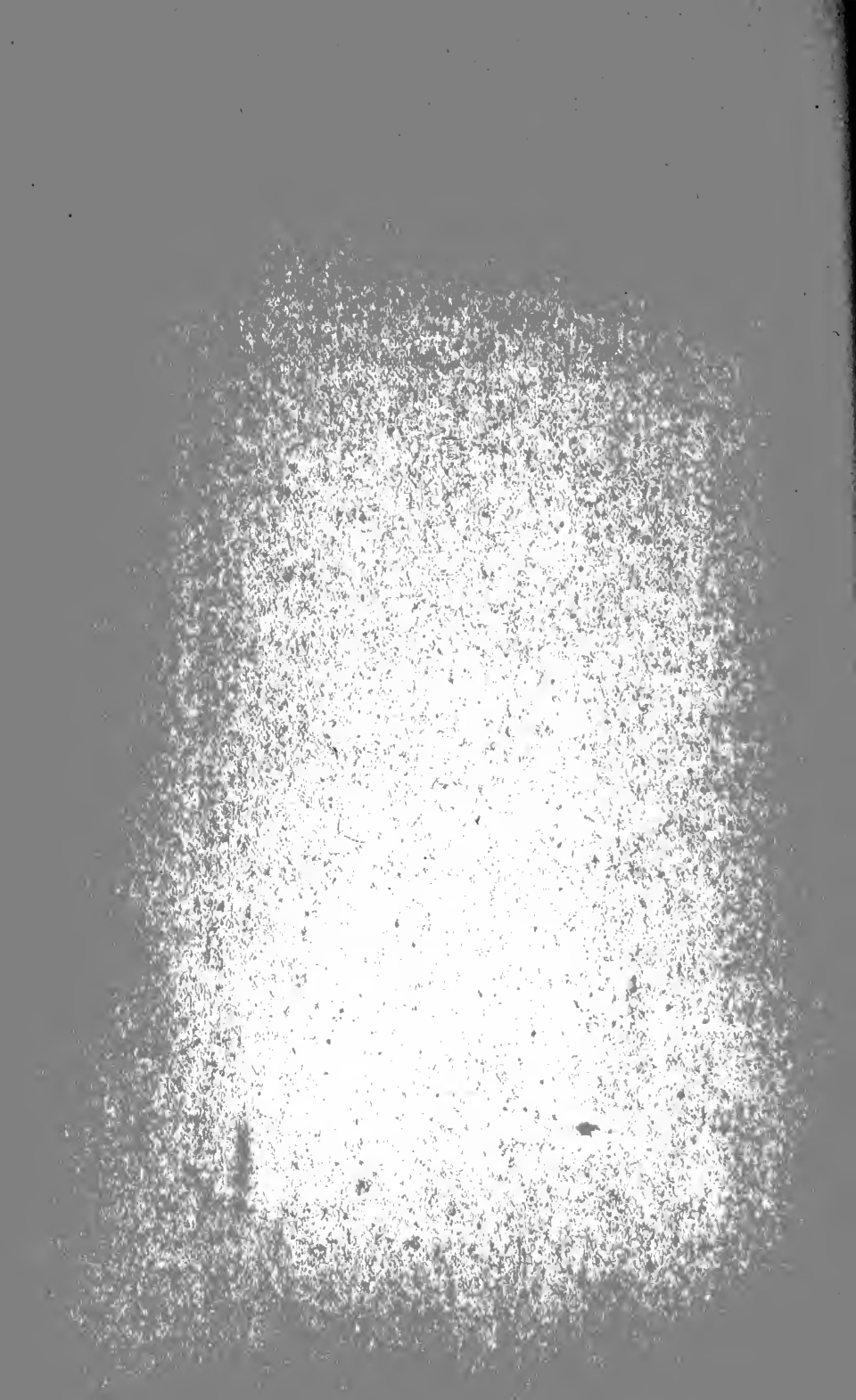
vs.

REUBEN B. DAIGLE,
Appellee.

BRIEF OF APPELLEE.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Solicitors for Appellee.

Pernau Press.



No. 1124.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ROBERT H. FLEMING,
Appellant,

vs.

REUBEN B. DAIGLE,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This suit was brought in the United States District Court of Alaska, Third Division, to compel the conveyance of a half interest in a certain mining claim, which claim was made the subject-matter of a contract entered into between the parties hereto on June 16, 1903. The said contract required appellant to "sink" three shafts, or a stated equivalent, to bedrock on said claim between July 1, 1903, and February 1, 1904, in consideration for which "design"

work appellee agreed to transfer a divided half interest in the claim to appellant.

The only contention between the parties in the lower court was upon the question whether appellant performed his obligations under the contract, and so whether he was justified at any time in demanding a conveyance of the half interest in the property.

The cause was tried to the court on July 19, 1904; both parties produced their evidence and rested. The court thereupon reversed its decision and directed briefs to be filed (Trans., p. 8). Six days after the case was closed and submitted on briefs, and but one day before the findings of fact and conclusions of law were filed, and the judgment thereon entered, appellant moved the court for leave to recall and continue the cross-examination of one of appellee's witnesses (Trans., p. 30). The denial of this motion, and the lower court's findings of fact as they were found, and its refusal to find as appellant wished, are assigned as errors on this appeal.

ARGUMENT.

MOTION TO DISMISS THE APPEAL FOR WANT OF JURISDICTION.

Preliminary to a consideration of the merits of the appeal, we would urge upon the attention of the court a jurisdictional question which may probably render such consideration unnecessary.

The record is devoid of any showing as to the value of the subject-matter of the action. The law controlling this phase of the case is found in Carter's Annotated Alaskan Codes, page 252, Section 504, and is as follows:

> "Sec. 504. *Appeals and writs of error, how taken.* Appeals and writs of error may be taken and prosecuted from the final judgment of the district court of the district of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: * * * and that in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars, the United States Circuit Court of Appeals for the ninth circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders, of the district court."

Because of the jurisdictional character of the point, we apprehend that upon the mere suggestion of it, this court, in the absence of anything to show the requisite value, would, *sua sponte,* dismiss the appeal. Appellee, however, during the first part of January and six weeks before the day set for hearing, filed his motion to dismiss, and sent a copy thereof by registered mail to appellants at Fairbanks, noticing the hearing of the motion for the same day as that set for the hearing on the merits.

We respectfully submit that in the absence of proof that the subject-matter of the controversy is of

$500 value, this court will not be justified in entertaining the appeal.

Parker v. Morrill, 106 U. S. 1;
Bowman v. Railway Co., 115 U. S. 611.

THE MERITS OF THE APPEAL.

We have not been favored with the preparation of a brief by appellant in this case as required by rule 24, and so do not know precisely what claimed errors our opponent would emphasize in support of the appeal. We shall, however, cover the entire field of the assigned errors, inasmuch as the record is not large and the assignments may be classified so as to minimize the consumption of this court's time—always having regard to space and time necessary to properly present the rights of the party whom we represent.

All of appellant's assignments of error, excepting numbers XXI and XXII, are of the class condemned by this court in Last Chance Min. Co. v. Bunker Hill & Sullivan Min. & C. Co., 131 Fed. Rep. 579, 587, 588, and in Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co., 114 Fed. Rep. 417.

In the last-named case this court said:

> "The record contains a bill of exceptions embracing, among other things, various assignments of error, the 2d, 3d, 4th, and 5th of which are to the effect that the trial court erred in making certain of its findings of fact, which findings of fact so complained of these assign-

ments of error respectively set out at large. The 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th 15th, 16th, 17th, 18th, 19th, and 20th assignments of error are to the effect that the court below erred in refusing to make certain findings of fact requested by the defendant to the action. It is very clear that these assignments are unavailing. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive in the appellate court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. Stanley v. Supervisors, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Distilling & Cattle Feeding Co. v. Gottschalk Co. 13 C. C. A. 618, 66 Fed. 609; Cable Co. v. Fleischner, 14 C. C. A. 166, 66 Fed. 899; Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co., 45 C. C. A. 638, 106 Fed. 798."

The proposition is so well settled that we content ourselves with the mere citation of the following additional authorities without taking excerpts from them:

Tyng v. Grinnell, 92 U. S. 467, 468;
Stanley v. Supervisors, 121 U. S. 535, 547;
St. Louis v. Rutz, 138 U. S. 226, 241;
Davis v. Schwartz, 155 U. S. 631, 636;
Dooley v. Pease, 180 U. S. 126, 131;
Singleton v. Felton, 101 Fed. 526, 527;
King v. Smith, 110 Fed. 95, 96;
Pacific, etc., Co. v. Fleischner, 77 Fed. 713, 715.

If this court should consider itself called upon to review the record for the purpose of determining

whether or no the findings are supported by the evidence, we feel perfectly assured that it will find after such examination, not only that the findings are fully supported, but that findings to the contrary, findings such as appellant proposed, would have been in utter disregard of the plain facts, as brought out upon the trial.

The evidence shows clearly:

That plaintiff did not sink three holes to bedrock on the claim in dispute— the condition precedent to the right to the transfer demanded.

Appellee claimed in his notice of location "1320 feet down stream & 330 on each side of the center stake" (Trans., p. 27). It appears, however, that he staked originally "330 plus 117" feet on the lower side (Trans., p. 29). *After* appellant, Fleming, had engaged to sink three holes to bedrock on appellee's ground, and *after* commencing the first hole at a point "*sixty or seventy feet* from the lower side-line"—to quote the words of his own testimony (Trans., p. 9, and again at p. 19)—he conceived the notion of locating the excessive portion along the lower side-line. Hence, on July 14, 1903, "the contract having been made long before", to again quote his testimony (Trans., p. 21) and, as a matter of fact, a month, lacking two days, before—we find him staking the "fraction" and claiming "1320 feet down stream and *140* feet wide off number 6 hillside", the claim in question (Trans., p. 28). Whether such posting of notice and staking of the "fraction" was effective

as giving appellant all of the *140* feet that he thereby claimed or only *117* feet, the excessive width, makes no difference, inasmuch as one of the three holes, which appellant contends satisfied his obligation, was but "sixty or seventy feet from the lower side-line" (Trans., p. 9), and so within the boundaries of the "fraction", as he himself admitted in answer to the court (Trans., p. 20).

This fraction appellant claimed up to the time of trial and even while on the witness stand.

" I *claim* to own the fraction that was there; I " think I ought to have it" (Trans., p. 11), at which late moment his counsel attempted to abandon it (Trans., p. 20).

And aside from the fact that the hole is within the "fraction" boundaries, appellant necessarily claims it, for the only discovery upon which the location of the *fraction* might be predicated was, according to his testimony, a *discovery of gold in the hole in question* (Trans., p. 22).

And so we say, if this court feels itself called upon to examine the evidence, it need look no further than plaintiff's own testimony to justify findings and judgment in favor of defendant.

Saving the one hereinafter referred to, all the remaining assignments of error are attacks upon the conclusions of law, not because such conclusions of law are not justified by the findings of the trial court, but because the facts should have been found dif-

ferently, resulting in different conclusions of law. If (1) appellant will not be, as we contend, permitted to assail the findings, or if (2) as we further contend, the evidence amply supports the findings, there remains but one question: Do the findings support the decree? To this there can be but one answer, we respectfully submit—the prerequisite to the right to demand a conveyance of the half interest not having been established, the transfer will not be compelled.

THE REFUSAL OF THE COURT TO RE-OPEN THE CASE TO PERMIT APPELLANT TO RESUME HIS CROSS-EXAMINATION OF APPELLEE'S WITNESS.

This application came six days after the case was closed and submitted on briefs of counsel (Trans., p. 30) and, we submit, was properly denied.

It is unnecessary to question here the propriety of the proposed cross-examination or the competency of the proposed documentary evidence. Such an application is addressed to the sound discretion of the trial court, and an unabused exercise of such discretion is seldom made the basis of an appeal. The court would have gone to the verge of leniency to have granted the motion to re-open the case so long a time after its submission on briefs, and the refusal of such extreme indulgence cannot be successfully urged here as cause for reversal.

> "Offers of proof" (in this case made regularly before the testimony was closed) "must

be offers of relevant proof, specific, not so broad as to embrace irrelevant and immaterial matter, and made in good faith. The exercise of the discretion of the trial court in rejecting these offers cannot be properly reviewed by us."

Central Pacific Railroad v. California, 162 U. S. 91, 117.

See also:

Means v. Bank of Randall, 146 U. S. 620, 629;

Davis v. Coblens, 174 U. S. 719, 727;

Seymour v. Lumber Co., 58 Fed. (C. C. A.) 957, 960;

Metropolitan St. Ry. Co. v. Davis, 112 Fed. (C. C. A.) 633;

Southerland v. Round, 57 Fed. (C. C. A.) 467, 470.

If the appeal be entertained at all by this court, we respectfully submit that the judgment should be affirmed.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Solicitors for Appellee.

No. 1125

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MATT MEEHAN and THOMAS LARSON,

Appellants,

vs.

O. A. NELSON, G. M. HENSLEY and MICHAEL McMAHON,

Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the District of Alaska, Third Division.

THE FILMER BROS. CO. PRINT, 424 SANSOME ST., S. F.

INDEX.

United States Circuit Court of Appeals, for the Ninth Circuit.

MATT MEEHAN and THOMAS LARSON,

Appellants,

vs.

O. A. NELSON, G. M. HENSLEY and MICHAEL McMAHON,

Respondents.

Order Extending Return Day.

Now, on this 31st day of August, 1904, the above-entitled cause coming on to be heard before the Judge of the United States District Court in and for the District Court, Third Division, at Fairbanks, Alaska, upon the petition of the appellants, appearing by their counsel Messrs. Claypool, Stevens and Cowles, and the respondents O. A. Nelson and G. M. Hensley appearing by their counsel, H. J. Miller, Esq., as well as the respondent Michael McMahon appearing by his counsel David T. Roy, Esq., the said appellants request an order extending the time within which to docket said cause and to file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and shows that the same is necessary by reason of the great distance, slow and uncertain communication be-

tween said Fairbanks, Alaska, and the City of San Francisco, California; and the said Judge of said Court upon the hearing of said motion and being fully advised in the premises and considering that good cause has been shown for the granting of the same—

It is hereby ordered that the time within which the said appellants shall docket said cause on appeal and the return day named in the citation issued by this court be enlarged and extended to and including the 15th day of November, 1904.

JAMES WICKERSHAM,

Judge of the United States District Court, District of Alaska, Third Division.

Due service of the foregoing order and the receipt of a copy thereof is hereby admitted this 31st day of August, A. D. 1904.

_____,

Attorney for Respondents O. A. Nelson and G. M. Hensley.

DAVID T. ROY,

Attorney for Appellant Michael McMahon.

Entered, Aug. 31, 1904, in Journal 3, p. 282.

The United States of America,
Third Division of Alaska, to wit:

At a District Court of the United States for the Third Division of the District of Alaska, begun and held at the courthouse in the Town of Fairbanks, Alaska, on the second Monday of June, being the thirteenth day of the same month, in the year of our Lord one thousand nine hundred and four—Present: The Honorable JAMES WICKERSHAM, District Judge.

Among other were the following proceedings, to wit:

In the United States District Court, in and for the District of Alaska, Third Division.

O. A. NELSON and G. N. HENSLEY,
Plaintiffs,
vs.
M. MEEHAN and T. LARSON,
Defendants.

Complaint.

The plaintiff complains, and for cause of action alleges:

1. That on the sixth day of February, 1903, the defendants were seised and possessed of certain real property, to wit, placer mining claim Number Three Above

on Fairbanks Creek, Alaska, described in the agreement hereinafter mentioned, and containing twenty acres.

2. That on the same day the plaintiffs and defendants entered into an agreement in writing, dated on that day, by which the defendants agreed that they would, in consideration of plaintiffs sinking three holes to bedrock on or near the boundary line between Three and Four Above Discovery on said Fairbanks Creek, District of Alaska, duly convey to said plaintiffs an undivided one-half interest in said placer mining claim Number Three Above Discovery on said Fairbanks Creek. In consideration whereof plaintiffs agreed to perform said conditions on their part, of which said agreement the following is a copy:

"Gold Stream, Feb. 6, 1903.

This is an agreement between M. Meehan and T. Larson of the first part and O. A. Nelson and G. N. Henslay of the second part. In consideration of sinking 3 holes to bedrock on or near the lines of Three and Four Above Dis. on Fairbanks, trib. of Fish of Fairbanks Mining District of Alaska. In consideration they receive ½ interest in No. 3 above Dis. on Fairbanks Creek.

M. MEEHAN.

Work to begin immediately. In case of water driving them out will extend time until July 1, 1903.

M. MEEHAN,

T. LARSON."

3. That plaintiffs duly performed all the conditions of said agreement to be by them kept and performed

previous to the time fixed in said agreement for the performance thereof.

4. That on or about the twentieth day of March, 1903, and after plaintiffs had duly performed all the conditions of said agreement on their part they demanded from the defendants a conveyance of said interest in said premises, and repeatedly requested defendants specifically to perform their agreement to convey to plaintiffs said one-half interest in said placer mining claim, but that they refused and ever since have refused, and still refuse so to do.

5. That long prior to the commencement of this action defendants took possession of said property and still occupy and withhold the same from plaintiffs.

6. That defendants have not executed a conveyance to plaintiffs.

Whereof plaintiff sues and demands judgment against said defendants:

1. That the agreement so made between the plaintiffs and defendants hereinbefore set out, may be specifically performed and that said defendants be adjudged to convey said interest in said placer mining claim to the plaintiffs, and to execute a good and sufficient deed therefor to them of said property.

2. For five thousand dollars damages for withholding the same.

3. For a reasonable attorney's fee, and for such other or further relief as to the Court may seem just.

H. J. MILLER,

Attorney for Plaintiff.

United States of America,
District of Alaska. } ss.

O. A. Nelson, being by me first duly sworn, deposes and says, that I am one of the plaintiffs in the above-entitled action; that I have read the above and foregoing complaint and know the contents thereof and that the same is true of my own knowledge.

[Seal] O. A. NELSON.

Subscribed and sworn to before me this eighth day of December, 1903.

H. J. MILLER,
Notary Public in and for the District of Alaska.

Filed in the U. S. Court, District of Alaska, 3d Division. Dec. 1903. A. R. Heilig, Clerk. By John L. Long, Deputy.

UNITED STATES OF AMERICA.

United States District Court, District of Alaska, Third Division.

O. A. NELSON and G. N. HENSLEY,
Plaintiffs,

vs.

M. MEEHAN and T. LARSON,
Defendants.

Summons.

To the above-named defendants, M. Meehan and T. Larson:

You are hereby required to appear in the United States District Court, in and for the District of Alaska, Third Division, within thirty days after the day of service of this summons upon you, and answer the complaint of the above-named plaintiffs, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiffs will take judgment against you for the specific performance of contract for conveyance of a one-half interest in placer mining claim Number Three Above Discovery on Fairbanks Creek, Alaska, and for five thousand dollars damages and for a reasonable attorney's fee.

Witness the Honorable JAMES WICKERSHAM, Judge of said Court, this ninth day of December, in the year of our Lord one thousand nine hundred and three, and of our independence one hundred and twenty-eight.

ALBERT HEILIG,
Clerk.
By John Long,
Deputy Clerk.

Filed in the U. S. Court, District of Alaska, 3d Division. Dec. 9, 1903. A. R. Heilig, Clerk. By John L. Long, Deputy.

In the United States District Court for the District of Alaska, Third Division.

O. A. NELSON and G. N. HENSLEY,
Plaintiffs,
vs.
M. MEEHAN and T. LARSON,
Defendants.

Answer.

Come now the above-named defendants by their attorneys, Claypool & Cowles, and for their answer to the complaint of the plaintiffs, heretofore made and filed herein, say:

I.

They admit the allegations of the first paragraph thereof.

II.

They admit the allegations of the second paragraph thereof.

III.

They deny the allegations of the third paragraph thereof in each, every and all particulars.

IV.

They deny the allegations of the fourth paragraph thereof.

V.

They admit the allegations of the fifth and sixth paragraphs thereof.

Wherefore the defendants demand judgment that they be dismissed hence, that the plaintiffs take nothing, that they have their reasonable costs and disbursements including an attorney's fee, and for such other and further relief as may be just and lawful.

By their Attorneys
CLAYPOOL & COWLES.

District of Alaska,
Fairbanks Precinct } ss.

M. Meehan, being first duly sworn, on his oath says: That he is one of the defendants in the action herein; that he has read the foregoing answer, knows the contents thereof, and that the same is true.

[Seal] M. MEEHAN.

Subscribed and sworn to before me this 30th day of December, 1903.

C. E. CLAYPOOL,
Commissioner.

Service by receipt of a copy of the foregoing answer admitted this 30th day of December, 1903.

H. J. MILLER,
Attorney for Plaintiffs.

Filed in the U. S. Court, District of Alaska, 3d Division. Dec. 30, 1903. A. R. Heilig, Clerk. By John L. Long, Deputy.

In the United States District Court, in and for the District of Alaska, Third Division.

O. A. NELSON and G. N. HENSLEY,
Plaintiffs,
vs.
M. MEEHAN and T. LARSON, and MICHAEL McMAHON,
Defendants.
127.

Amended Complaint.

The plaintiffs complain and for cause of action allege:

1. That on the 6th day of February, 1903, the defendants, M. Meehan and T. Larson were seised in fee and possessed of a certain placer mining claim, to wit, placer mining claim Number Three Above Discovery on Fairbanks Creek, Alaska, and more definitely described

in the agreement hereinafter mentioned, and containing twenty acres.

2. That on the same day the plaintiffs and defendants Mat Meehan and T. Larson, entered into an agreement in writing, dated on that day by which the defendants agreed that they would, in consideration of plaintiffs sinking three holes to bedrock on or near the boundary line between Three and Four Above Discovery on said Fairbanks Creek, Alaska, duly convey to said plaintiffs an undivided one-half interest in said placer mining claim Number Three Above Discovery on said Fairbanks Creek. In consideration whereof plaintiffs agreed to perform said conditions on their part to be performed under said agreement, of which said agreement the following is a copy:

"Gold Stream, Feb. 6, 1903.

This is an agreement between M. Meehan and T. Larson of the first part and O. A. Nelson & G. N. Hensley of the second part. In consideration of sinking three holes to bedrock on or near the lines of Three and Four Above Dis. on Fairbanks, trib. of Fish of Fairbanks Mining District of Alaska. In consideration they receive one-half interest in No. 3 Above Dis. on Fairbanks cr.

M. MEEHAN.

Work to begin immediately. In case of water driving them out will extend time until July 1, 1903.

M. MEEHAN,
T. LARSON."

3. That plaintiffs duly performed all the conditions of said agreement to be by them kept and performed previous to the time fixed in said agreement for the performance thereof.

4. That on or about the twentieth day of March, 1903, and after plaintiffs had duly performed all the conditions of said agreement on their part they demanded from the defendants a conveyance of said interest mentioned in said agreement in said premises, and repeatedly requested defendants to specifically perform their part of said agreement to give and convey to said plaintiffs said one-half interest in and to said placer mining claim, but that they refused and ever since have refused, and still refuse so to do.

5. That long prior to the commencement of this action defendants took possession of said property and still occupy and withhold the same and every part thereof from plaintiffs, to their damage in the sum of five thousand dollars.

6. That defendants have refused and have not executed a conveyance to plaintiffs.

7. That defendant, Michael McMahon, has or claims an interest in said described premises by virtue of an agreement with defendant Matt Meehan, made October the 14th, 1901, and filed for record October the 1st, 1903, on page 140 of miscellaneous records, which said agreement is in the words and figures following, to wit:

"This agreement made the 14th day of October, A. D. 1901, between Michael McMahon and Matt Meehan,

both of the town of Nome, in the District of Alaska, witnesseth:

That the said parties to this agreement hereby form with each other a copartnership and agree with each other to become copartners for the purpose of prospecting, locating, occupying and developing mining ground in the District of Alaska, and working and prospecting the same.

Each copartner shall devote all his time and attention to the business of the copartnership aforesaid.

The copartners shall continue for the term of three (3) years unless sooner terminated by mutual agreement and division of the property then acquired by the parties above named.

Witness the hand and seals of the said parties the day and year first above written.

MICHAEL McMAHON. [L. S.]

MATT MEEHAN. [L. S.]

In the presence of:

S. A. KEUER,

T. E. FAUER."

3. That said claim was located by and in the name of Matt Meehan, and that at the time of said location and prior thereto said defendant, Meehan, had a similar agreement with defendant, Larson, and that by reason thereof the said Meehan only became seised and possessed of an undivided one-half interest in said premises as a tenant in common with said Larson, said half interest subject to the interest of McMahon, and the said McMahon only became seised and possessed of an un-

divided one- quarter interest in said claim by reason of said agreement with said Meehan, if any interest at all, and that said interest, if any, was subject to the agreement hereinbefore first set forth and the interest of the plaintiffs thereunder, and if not so subject the plaintiffs are entitled to onehalf of said claim represented in the interests owned and possessed by said defendants Meehan and Larson at the time said contract was made.

9. That at the time said contract between the plaintiffs and defendants Meehan and Larson was made and entered into and for a long time thereafter, and not until after all the conditions of said contract were by the plaintiffs performed on their part did they have any notice, knowledge or information of said agreement hereinbefore last set forth.

Second.—And for a further amended and supplemental complaint plaintiffs allege:

1. That plaintiff and defendants are tenants in common in said described premises, to wit, placer mining claim Number Three Above on Fairbanks Creek, Alaska, the plaintiffs owning an undivided one-half interest therein, and that at all the times hereinbefore set forth the defendants have been and now are in the exclusive possession thereof.

2. That during said time and times the defendants Meehan & Larson received and collected all the royalties, rents and profits of said described premises amounting in the whole as plaintiffs are informed and believe, and therefore allege the fact to be, to seven

thousand dollars, received by said defendants as royalty as aforesaid.

3. That said defendants occupied said premises upon an implied agreement with plaintiffs as their receiver or bailee of their share of the said royalties and rents.

4. That prior to the filing of this supplemental complaint plaintiffs demanded of said defendants an accounting of said royalties, and the payment to them of their share of the same, and upon said demand defendants refused and still refuse to account and pay said plaintiffs their share thereof, or any part of same at all.

Wherefore plaintiffs sue and demand judgment against said defendants:

1. That the plaintiffs are the owners of an undivided one-half interest in said premises.

2. That the agreement so made between the plaintiffs and defendants hereinbefore set out, may be specifically performed, and that said defendants be adjudged to convey said interest in said placer mining claim to the plaintiffs, and to execute a good and sufficient deed therefore to them of said property.

3. For five thousand dollars damages for withholding the same and for three thousand and five hundred dollars for plaintiffs' share of the rents and profits thereof, and for a reasonable attorney's fee and for such other and further relief as to the court may seem just.

H. J. MILLER,
Attorney for Plaintiffs.

United States of America,
District of Alaska. } ss.

O. A. Nelson, being first duly sworn, deposes and says: That I am one of the plaintiffs; that I have read the above complaint and know the contents thereof and that the same is true as I verily believe.

[Seal] O. A. NELSON.

Sworn and subscribed to before me this tenth day of June, 1904.

H. J. MILLER,
Notary Public.

Filed in the U. S. Court, District of Alaska, 3d Division. Jun. 18, 1904. A. R. Heilig, Clerk. By ———, Deputy.

In the United States District Court for the District of Alaska, Third Division.

O. A. NELSON and G. N. HENSLEY,
Plaintiffs,
vs.
M. MEEHAN, T. LARSON and MICHAEL MacMAHON,
Defendants.

Answer of Michael MacMahon.

The defendant, Michael MacMachon, answering for himself the amended complaint of plaintiffs says:

1. That he denies each and every allegation contained in paragraphs 1, 2, 3, 4, 5, 6 and 9 of the first cause of action of plaintiffs' complaint.

2. That he also denies each and every allegation contained in the amended and supplemental complaint of plaintiffs.

3. This answering defendant in answer to paragraphs seven (7) and eight (8) of plaintiffs' amended complaint says:

That he claims and owns the undivided one-half interest in the said claim, placer mining claim Number Three (3) Above Discovery on Fairbanks Creek, Alaska; that this defendant owns a half interest in said claim by reason of and under said contract set out in paragraph seven (7) of plaintiffs' complaint.

4. This plaintiff admits the said claim was located by the said Matt Meehan and that he did so under the said agreement with this plaintiff, and this plaintiff has an undivided one-half interest in said claim.

5. This plaintiff has commenced an action in this court against the said Matt Meehan and others, case number 163 of the Civil Docket. The object of said suit is to determine the interests and right of this plaintiff in a large number of claims located by the said Matt Meehan and T. Larson including placer mining claim Number Three (3) Above Discovery on Fairbanks Creek, and to also determine the interests and royalties and asking for a partition and dissolution of the partnership between this plaintiff and the defendant Matt Meehan under the agreement heretofore entered into between them.

This plaintiff asks that his interest in the said claim Number Three (3) Above Discovery on Fairbanks Creek be not determined in this action, but be deferred and determined in said case number 163; that he be saved from costs in this proceeding and such other and further relief as is just and equitable.

MICHAEL MacMAHON,
By DAVID T. ROY and
N. V. HARLAN,
Attorneys for Defendant Michael MacMahon.

Verification and filing out of time hereby waived.

H. J. MILLER,
Attorney for Plaintiffs.

Filed in the U. S. Court, District of Alaska, 3d Division. July 18, 1904. A. R. Heilig, Clerk. By ———, Deputy.

In the United States District Court for the District of Alaska, Third Division.

O. A. NELSON and G. M. HENSLEY, Plaintiffs,
vs.
MAT MEEHAN and THOMAS LARSON, Defendants.
No. 127.

Testimony.

This case came on regularly for trial in the United States District Court for the District of Alaska, Third Division, begun in the town of Fairbanks, in said Divi-

sion and District on the 14th day of June, 1904, before the Honorable James Wickersham, Judge of said Court.

Court convened pursuant to recess on the 18th day of July, 1904, at 10 o'clock A. M., and the following proceedings were had:

Appearances:

The parties plaintiff and defendant in person.

H. J. MILLER, for Plaintiffs and

CLAYPOOL, STEVENS and COWLES, for Defendants.

O. A. NELSON, the plaintiff herein, being duly sworn, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. You are one of the plaintiffs in this action?

A. Yes, sir.

Q. State what arrangements you had, if any, with the defendants, about February, 1903, with regard to Number 3 Above Discovery on Fairbanks Creek.

A. We entered upon an agreement that we were to represent and sink three holes to bedrock on Three and Four for a half interest in three.

Q. Have you the agreement? A. Yes, sir.

Q. Who wrote that agreement?

A. Mr. Meehan.

Q. Did you do anything under that arrangement in the way of carrying out the agreement?

A. I fulfilled the contract.

(Testimony of O. A. Nelson.)

Q. State what you did.

A. We went up there with the grub and started sinking; Hensley started a hole on the 6th of February, I think.

(By the COURT.)

Q. Of what year?

A. 1903; we had Meehan's dogs and moved our stuff out with them; I went back with them and I came back to six and then the work was started; there was a fire put going in the first hole and the next morning we cleaned that fire out and started to dig for the second hole, we got that through the muck and had a fire in the two holes and then started on the third hole and kept working away until we got to bedrock in the second hole, that is the hole on the lower end of four, and almost to bedrock on the other hole, that would be on the upper end of three; we was down but I don't remember how many feet; we was down in the third hole and we ran out of grub and built a fire in the second hole; after we got the grub we cribbed and finished two, I was taking some prospects in the third hole but the water filled it and we couldn't do the work and so when we had fulfilled the contract we took and pulled the grub back out of there.

Q. Did you meet Meehan and Larson on your return with the grub?

A. Yes, we stopped there for dinner, we was entirely out, didn't have anything for breakfast; we was pretty

(Testimony of O. A. Nelson.)

hungry and when we got a square meal we went on into town that same day.

Q. When did you get back from town?

A. The next day and went out as far as Twin.

Q. How long were you absent from the claim?

A. Three days, one day in and two days out.

Q. Did you ever have any conversation with the defendants about what you had done and why you came in?

A. We told them we had got to bedrock with one hole and found a little prospect there and that we was almost to bedrock with the second one. There was two fires when we got back with the grub brought us to the second hole. We was down to the muck in the fourth hole; the muck was something like 12 or 14 feet in the third hole, the hole on the upper end of three over towards the right limit.

Q. After you had returned with your grub and finished your work, then what did you do?

A. After the work was done I went over on Captain creek one trip, that was on the 6th of March.

Q. State how soon after that you met Meehan and Larson.

A. We started to pull out of there the 7th and only made two or three miles the snow was too deep and we had to make a camp; we snow shoed a trail out that same day and on the 8th we got out as far as the mouth of Twin; I think at Golden City on the 8th or 9th we saw Meehan and Larson.

(Testimony of O. A. Nelson.)

Q. State what took place there.

A. We told them that the work was done and told Meehan and told them, I supposed they would like to go and investigate, and he told me, "I guess the work is alright; when you go into town make out your papers and some time when we both came in we will sign them."

Q. Who was present?

A. Hensley was present and Meehan was sitting on the bed when he said it.

Q. Were you present?

A. I am the one that asked the question or made the statement.

Q. What did you do next with regard to making out the papers with according to Meehan's instructions?

Q. We got them some time; I think it was the 16th of May the papers were made out, although I saw Meehan before that time in town and told him we hadn't got the papers made out yet.

Q. When did you see him next?

A. The next I saw him after I got the papers, that was some time in June; I went out on purpose to see him.

Q. State what happened on that occasion.

A. Why, he had told me before that they were going to bale the water out of the holes and see whether they were to bedrock or not, and I told them to go ahead, I expected they had done that when I went out there with the papers but he said he hadn't done it, and was going out to do the work.

(Testimony of O. A. Nelson.)

Q. Did you present him with any paper to sign?

A. I had the paper with me but the way they spoke there was no use of presenting it.

Q. Have you that paper now? A. Yes, sir.

Q. Will you produce it?

(Witness here presents the paper.)

Q. Had you that paper with you at that time?

(Objection as immaterial. Objection sustained.)

Q. State what was said about any conveyance to you.

A. They stated they would not sign any papers at all so I didn't say I had any papers with me or anything to that effect. I said something about I would like to get the papers signed, but when I heard there was no chance that they would sign it I didn't show the papers any.

Q. Did you make any other effort to have them carry out their part of the agreement?

A. I didn't personally but Hensley there talked to them.

Q. Did you try through any other agency or any other party to have this matter approved?

A. I think Hensley employed you to look after it.

Q. Do you know anything about my employment?

A. Not personally but I understood so.

Q. Did you talk with any one else, any attorney about or regarding looking this matter up?

(Objection is immaterial. Objection sustained.)

Q. Will you state to the Court how long you worked?

A. We was there a month excepting three days.

(Testimony of O. A. Nelson.)

Q. Will you state the depth to bedrock?

A. The first hole was a strong 16 feet deep and one foot down in the bedrock; the second hole is 17 and some inches to bedrock, I think three inches or something like that—any way it is a strong 17 feet, and the other one is 22 feet or about that.

Q. Can you indicate to the Court on what portion of those claims these holes were sunk? A. I can.

Q. You are familiar with that (hands him a map).

A. This is Number Four; there is the initial stake, 330 feet each side of them, and that is the hole on the lower end of four, and this is the second hole, and there is the hole on the lower end of Four and these are the two holes on the upper end of Three, that hole there is 225 feet from the center line; this is the creek running here; that one is pretty close to the creek.

Q. Did you measure the distance from the center stake to the outside hole?

A. Yes, sir, 275 feet; that is as near as a man can measure with a tape line.

Q. Can you state when you went there to work?

A. The time was the first part of February, 1903; the work was started on the 6th; I don't remember just how many days it took us to move over there.

Q. What was the condition of things there as regards persons working on the adjoining claims?

A. There was a man by the name of Farrington, I believe he was on 12; he was drowned out with water;

(Testimony of O. A. Nelson.)

Mr. McPike was drowned there; I ain't certain whether it is Discovery or One Above Discovery.

Q. State when this work was commenced, with reference to any work having been commenced on Fairbanks Creek, as to its being the first or second work commenced, or any other work commenced, of any work that was commenced there.

A. I don't nkow whether McPike had got to bedrock with any hole or not when we got there. If he did, that should be the first one as got to bedrock.

(By the COURT.)

Q. On Fairbanks Creek? A. Yes, sir.

Q. What was the condition of the snow?

A. The snow was very deep.

Q. Any trails broken?

A. No, sir; we fell into snow up to our arm pits lifting our sleds back.

Q. Were the boys about through when you finished the work? A. McPike was.

Q. Did either Meehan or Larson ever inform you that you were not to bedrock?

A. They said they had doubts about it.

Q. Do you know anything they did in carrying out their doubts?

A. They sunk some holes, I understood, and drifted.

Q. What did you know about it?

A. I don't know anything, I was never down in there; it is only hearsay. I have been there and seen the holes and seen the drifts, I can't say personally.

(Testimony of O. A. Nelson,)

Q. As to sinking them you can't say?

A. No, sir.

Q. State what you saw there.

A. I saw two holes sunk below my holes and a drift started on them.

Q. You can explain to the Court about how those holes were sunk.

A. They were sunk below my holes.

Q. What do you mean by below?

A. Down stream.

Q. How far?

A. I didn't pay any attention to that.

Q. Well, about how far?

A. I think some where about 10 or 12 feet as near as I can remember.

Q. State to the Court now generally what you know about that—this shaft you are speaking of.

A. I know that there were two there below my holes and that the drifts was run to the left as I understand.

Q. Explain to the Court with your pencil there about those shafts on that plat.

A. This is where the holes was as near as I can say; this is where the drift run from them holes; I wasn't down in them, I was just looking from the top.

Q. You weren't down in there yourself?

A. No, sir.

Q. Who was present at the same time?

A. McKay and Gibbs was present when I was there.

Q. Where was Henley?

(Testimony of O. A. Nelson,)

A. I don't hardly know; he was in Skagway and wrote to me that he would be in here the first of April; I have been expecting him and he aint got here.

Cross-examination.

Mr. CLAYPOOL.—I want to explain that Mr. Roy appears for Mr. McMahon, and to as that we may cross-examine separately.

(Mr. ROY.)

Q. Had you at any time any conversation with McMahon as to going out there and sinking those holes?

A. I hadn't.

Q. Didn't speak with him? A. No.

Redirect Examination.

(Mr. MILLER.)

Q. Had you any knowledge of any interest of McMahon in this property at this time?

A. Not the least.

Q. Any conversation with him or any mention of him by the other defendants? A. Not at all.

Q. You knew nothing of him? A. Not a bit.

Q. As far as any claim to this property is concerned?

A. No, sir.

Recross-examination.

(Mr. CLAYPOOL.)

Q. I wish you would indicate here on the map the first hole that you say is 16 feet; will you please write the figure one there? A. Yes, sir.

(Testimony of O. A. Nelson,)

Q. Now, the second hole you testified was 17 feet and some inches? A. This is it.

Q. And the other you will please number three.

A. Yes, sir.

(Witness here marks the plat as requested.)

W. H. WOOLRIDGE, witness being produced on behalf of the plaintiffs, testifies as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Have you been on Fairbanks Creek?

A. Yes, sir.

Q. A number of times? A. Yes, sir.

Q. About how often?

A. I think I have made about four trips there, all told.

Q. State when you were there.

A. I went out there the first time some time in November, that is along about the first; I don't know the date exactly, and I remained there until late in December.

Q. Where were you located?

A. On the bench of Four Below.

Q. State what you know about Three and Four Above on Fairbanks Creek.

A. I know about them as the trail passes them, and about the 24th of December I was on Three and Four.

Q. State for what purpose and what you did.

(Testimony of W. H. Woolridge.)

A. I was sent there to measure the holes that were supposed to have been sunk by Meehan, or his crowd, which I did.

Q. What date? A. December 24th.

Q. Of 1903? A. Yes, sir.

Q. State to the Court what you know about it and what you did?

A. I was not able to do that work alone, and I got some men to go with me.

Q. Who?

A. George Steelsmith, George Ashenfelter and William Crabb.

Q. Go on and tell the Court all about it.

A. We went to those holes and the first hole, or about where that hole was, was covered with a glacier; Mr. Ashenfelter showed us where the hole was, but it was entirely covered; that was the one—where is that paper? This is the one that he has Nnmber One hole, this was entirely covered with glacier, we were unable to find it at all; then we went to this one that is marked Nnmber Two, and it was sluffed in; to get back, I was sent there to measure these old holes, the depth of them, and also the one that was sunk by these people; I was unable to get into the holes because they were covered with snow and ice and sloughed in so.

(By Mr. CLAYPOOL.)

Q. Two and three, you mean?

A. Yes, sir, these holes which was supposed to be sank by Nelson but we went into this hole Number Two

(Testimony of W. H. Woolridge.)

and measured the distance from the surface to the bottom of the hole, and the distance from the hole—the length of this drift—and the distance at the surface.

Q. The old hole is Number Two?

A. Well, this hole by the side of Number Two, sunk by Meehan is the one that we measured, I measured the depth of the hole from the surface and the length of the drift from this hole, and the distance of this hole sunk by Meehan to the hole sunk by Nelson at the surface; now do you want the depth of these in feet?

(By Mr. MILLER.)

Q. Yes, sir.

A. Well, I didn't tax my memory with that, but I put it down at the time and have my notes with me.

Q. Referring to the notes you made at the time you may state to the Court how they were made and on what facts they were based.

A. Mr. Ashenfelter held the line at the surface and I held the line at the bottom of the hole; the hole now that I am describing is hole known as Number Two; the depth of this hole is 16 feet and seven inches.

(By the COURT.)

Q. That is the new hole?

A. Yes, the hole put down by Meehan. The distance from the old hole is nine feet at the surface, that is from the edge of one hole to the edge of the other; the length of the drift at the bottom of this hole sunk by Meehan is twelve feet and two inches; the width of the drift at

(Testimony of W. H. Woolridge.)

the mouth is three feet; the head of the drift at the mouth is four feet and eight inches; and the head of the drift at the back end is two feet and four inches; that is the measurements of the first hole and the second hole is then out here.

(By Mr. MILLER.)

Q. Hole Number Two?

A. Yes, sir. When we ran into this drift sunk by Mr. Nelson the drift didn't run directly from this hole to this, but it sheerd a little something like that would be (indicated). They followed the bedrock through and in striking this hole which is supposed to be put down by Nelson we found a break in the bedrock probably about 18 inches long, which shows a dip in the bedrock, well not exactly a dip but a break, and this break or indentation was filled with ice; this was not at the end of the hole, but on the side of the hole at the end, it had the appearance here as though this drift had been entirely taken out; this block of ice was undoubtedly the bottom of the hole put down by Nelson, it had all the appearance of being the bottom of the hole.

Q. You may state what the appearances were?

A. It showed that it was not glacier ice, only had sloughed in. It was not a clear blue ice like our glacier ice; it had the appearance of being dirty, muddy water that had run into the prospect hole.

Q. Were there any other facts that would cause you

(Testimony of W. H. Woolridge.)

to make the statement that you do that it was water that had run into the prospect hole?

A. Well, there is nothing else that I recall, except that it was not clear blue ice like you would find in a glacier.

Q. Could you tell whether that glacier continued below the bedrock, or even with it?

A. It didn't continue below the bedrock.

Q. Did it continue to it? A. Yes, sir.

Q. Were there any indications or formations around this ice that would indicate that it was the formation that originally existed there or something that existed by reason of a shaft or prespect hole having been put there? A. It looks as though the drift—

Q. Tell all you can about the appearance of that having been a prospect hole or not—that glacier or ice which you detected there?

A. I don't know that there is—

Q. Anything besides the ice and the character of the ice?

A. It looked as though when this last drift was put in there that there remained a part of it not taken out, whether it was that the points was run in there and the dirt not moved, or it sloughed from the roof would be a hard matter for a person to decide; it was one or the other.

Q. Where was this glacier with reference to the shaft and the hole supposed to be sunk by Nelson, on which side of this drift was it?

(Testimony of W. H. Woolridge.)

A. In looking downstream it would be on the right.

Q. How much of this glacier or ice did this drift strike?

A. Well, I didn't measure the face of the ice.

Q. Well, can't you give the Court an idea?

A. Well, I should judge there was six or eight inches of them that showed up distinctly, six or eight inches of face.

Q. Did it project into the drift or was it on a line with the wall of the drift?

A. It was on a line with the wall of the drift, or very nearly so?

Q. Was it flush with the wall of the drift?

A. Not quite.

Q. How much did it lack?

A. I didn't measure that indentation of the ice, I couldn't tell you exactly.

Q. Had they struck this ice and dug to it, or had it sloughed off?

(Objection as not a proper method of examination.)

The COURT.—The witness may state what it looks like.

A. It seems as though I have made that clear already.

Q. State about hole Number Three, all you know about that?

A. Then after we measured this hole Number Two, we went to hole Number Three—

(Testimony of W. H. Woolridge.)

Q. One moment, before you leave hole Number Two. State if you did anything to ascertain, or if you did anything to ascertain the direction in which this drift ran from one hole to the other.

A. We laid a stick right across the hole, like this—at the surface, and we had a line from this hole, had it pointed as near toward the center of the old hole as we could get, from the center of this hole—that is, the one put down by Meehan—and we laid the stick right across the center pointing as near as we could to the center of the old hole.

Q. Then what did you do with reference to that stick? While that stick was there what did you do to locate the direction of this?

A. We just simply found that the drift didn't run direct from one hole to the other but struck a corner of the drift and sheered a little.

Q. Was it dark or light back there?

A. It was light, we had a candle. I had the candle back at the end of this drift and Steelsmith lined it up and he said it didn't run direct to this hole, he held the candle back here and I went to the bottom of this hole and we could tell that it didn't run direct but it struck the hole; we could tell that it struck the bottom of that hole from the ice in the bottom of the bedrock.

Q. Who held the tape line?

A. Mr. Ashenfelter held one end and I started to put him on the edge of the drift there and I carried the other end myself.

(Testimony of W. H. Woolridge.)

Q. That was on the top? A. Yes, sir.

Q. Who was at the bottom?

A. Steelsmith at one end and I carried it out there and then we exchanged; I held the line here and he went to the back end.

Q. At what time, with reference to the time you did this, did you make those notes in your book?

A. At the same time while we were in the hole.

Q. You may state to the Court how far past this ice this drift extended.

A. I didn't measure that but it wasn't very far.

Q. Well, about how far?

A. I wouldn't judge; it was more than a couple of feet; the drift was not square across the end; it was rounded or something like that.

Q. You may state the character of that drift, at that end, as to the size of it, as compared with the size of it here, as to whether the size continued uniform all through, and if it varied, in what way it varied?

A. The head of the drift at the back end was two feet four inches.

Q. Was that less, or the same as any other portion?

A. It was considerably less.

Q. State all you know about hole Number Three.

A. We took the measurements of hole Number Three the same as hole Number Two, if you would like to have that all explained I can give you that.

Mr. MILLER.—Does the Court wish the witness to give them?

(Testimony of W. H. Woolridge.)

The COURT.—I don't care what you do.

Q. Go ahead and explain it to the Court.

A. We went to hole Number Three and took the measurement from the surface to the bottom of the hole, then we measured the length of the drift, then we measured the distance at the surface from the edge of one hole to the edge of the other the same as we did in taking the other measurements, and the depth of this hole sunk by Meehan was 22 feet and 8 inches, and the length of the drift 10 feet and 4 inches; and the width of the drift three feet, and the distance of the holes apart at the surface, nine feet.

Q. How much less was the drift than in hole Number Two in length?

A. The length of the drift in the first hole was 12 feet 2 inches and the length of the drift in the second hole was 10 feet 4 inches.

Q. Go right on and state to the Court about the drift in the second hole, Number Three.

A. I gave you those measurements. We entered this drift and carried the candle back to the end and laid a pole across the center of the drift pointing to the center of the old drift, as near as could be without measuring it, and then when we lined our light up with the pole we found it varied something like this would be (indicates). Now this is 12 feet.

Q. Go ahead and state all about that—continue right along with that drift and explain to the Court all about it.

(Testimony of W. H. Woolridge.)

A. Steelsmith carried a candle to the back end of the drift and I stood in the shaft Number Three; I lined that drift up with the pole we had across the center of the shaft and then we held the pole at the edge so as to try and see if the drift struck the other hole; we were all satisfied that it didn't strike the hole at all, that this drift missed the hole sunk by Nelson.

Q. It being ten feet four inches, might it, if it had been in a direct line, have missed the shaft sunk by Nelson and Hensley? A. No, sir.

Q. Do you know anything about the dimensions on the surface of that hole to the old hole sunk by Nelson and Hensley? A. No, sir.

Q. Approximately? A. No, sir.

Q. Can you give the Court an idea as to the character of that old shaft, was it two feet or eight feet?

A. Well, I should judge it would be in the neighborhood of five feet, or perhaps six; the edges had sloughed in considerably; the only thing I was particular about was to get the distance of the hole sunk by Meehan to the hole sunk by Nelson.

Q. State to the Court what date this was that you made this examination?

A. On the 24th day of December, 1903.

Q. Apparently, how long had this drift been sunk, or do you know?

A. I do not; it was not an old hole; it had been put down since the freeze-up.

Q. From this old shaft and from what you could say

(Testimony of W. H. Woolridge.)

of it, and from the dump that was taken from it, did it appear to have been taken down a considerable depth or apparently to bedrock?

A. There was considerable gravel and dirt around the hole.

Q. State the extent of the excavation as to whether it appeared to have been extensively worked or very limited as to the probable depth that had been made there by reason of it?

A. It looked as if there had been work enough done; there was work piled around it; there had been enough to put a hole down.

Q. How was it as compared with hole Number Two?

A. In what way?

Q. As to the appearances of work that had been done in the old drift?

A. There was very little difference in that respect.

Q. Judging from the surface indications and what you could see of the old shafts, if one of them was to bedrock, what would be your judgment as to the other having been to bedrock also?

Mr. CLAYPOOL.—There is nothing to found that on.

A. I couldn't tell anything about it.

Q. Was there the same amount of work done on the two holes?

(Objection as repetition. Objection overruled.)

A. It would be impossible for me to tell.

(Testimony of W. H. Woolridge.)

Q. Just apparently were the two holes alike—were the excavations of similar size, approximately, or not?

A. I couldn't tell in that respect because I didn't notice that part of it.

O. A. NELSON, recalled, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. When were these shafts made by Meehan and Larson, dug?

A. It was in the fall; I couldn't state the dates.

Q. When, with reference to this suit having been brought?

A. I think I brought the suit afterwards.

Q. Did you know of these shafts having been sunk before you brought this suit? A. Yes, I did.

Q. Did you make any examination of these shafts before you brought this suit? A. I did not.

Q. Do you know in what month these shafts were sunk by Meehan and Larson?

A. In October I suppose; I ain't certain.

Q. State to the best of your knowledge.

A. Well, at the freeze-up—it had froze up.

Q. Shortly after, or very long—you can give the Court an idea. Were you at Fairbanks at that time?

A. Yes, I was.

Q. Well, then state to the best of your knowledge.

(Objection to counsel cross-examining his own witness. Objection overruled.)

(Testimony of O. A. Nelson.)

A. Well, I don't remember where I was at the time I heard the statement. I cannot recollect any date to guide myself by. I know it had froze up. I started the suit afterwards.

Q. Had you gone about the hose or inspected them at the time you started your suit? A. I had not.

Q. Had you had anyone else go there for you?

A. I had not.

Q. Had you any knowledge other than what you heard in general conversation? A. I had not.

NORMAN McKAY, witness produced on behalf of plaintiffs being duly sworn, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Where have you lived for a number of years past? A. In Dawson.

Q. In what business?

A. I followed placer mining in Dawson.

Q. How long have you followed it?

A. Since the fall of '98.

Q. How long have you been at Fairbanks, Alaska?

A. Since last fall after the freeze-up.

Q. What have you been doing at Fairbanks principally—I mean in the District?

A. I remained here about a month until just before Christmas and went out to Fairbanks and sunk two holes there to bedrock on a lay on 4 Below.

(Testimony of Norman McKay.)

Q. How long were you on Fairbanks?

A. Up till the 23d of May.

Q. State if you went upon Numbers 3 and 4 at any time last winter to investigate some of the work there claimed to have been performed by Nelson and Hensley, and if so, when? A. Yes, I did.

Q. About when was that?

A. I don't just remember the date.

(Witness here refers to a note-book.)

(By Mr. CLAYPOOL.)

Q. What is that you have got?

A. It is just a memorandum of the depth of the holes.

(By Mr. MILLER.)

Q. What memorandum is that?

A. It is the depth of the holes—February 12th.

Q. Was that taken at the time you went there?

A. Yes, I made a little memorandum of the depth and distance between the shafts.

Q. That was made at the time you went there and made at the time you did this work, was it?

A. Yes, sir.

Q. Tell the Court who made that memorandum.

A. Mr. Gibbs, it was the 23d of February—no, the 12th—and we—

(Objection to witness telling what it is if he didn't make it himself. Objection sustained.)

Q. Did Mr. Gibbs make that with your knowledge?

A. Yes, the 12th of February.

(Testimony of Norman McKay.)

Q. Did you read it after Gibbs made it?

A. Yes, sir.

Q. At whose request did Gibbs make it?

A. Nelson and I.

Q. Was it made after the facts and the investigation there?

(Objection.)

By the COURT.—Ask him when it was made.

Q. When was it made with reference to what you did there? A. After the measurements was taken.

Q. Did you read it over immediately after it was made by Gibbs?

(Objection.)

By the COURT.—Let him go and state what they did.

Q. Go ahead and state what you did.

A. I went down the shaft—Gibbs and Nelson let me down; that is, we measured the depth of shaft No. 2 17 feet.

Q. Can you mark that on this plat?

Mr. CLAYPOOL.—They are marked 1, 2, and 3 and it isn't necessary to mark them any more, I think.

A. This "2" is the shaft sunk by Meehan. Nelson and Gibbs let me down and we measured the surface from the old shaft to the new one—it was 10 feet. The depth under the shaft was 17 feet. The length of the drift to where it struck the little glacier—the ice—was 10 feet. The distance from that into the end of the draft was 2 feet.

(Testimony of Norman McKay.)

Q. State to the Court about this glacier of ice that you testified about—what you saw?

A. I saw about the first six inches of ice—glacier—it was dark. The ice was very dark. It looked as though it was a glacier formed from the old shaft. I would say that by the experience I have had in drifting old drifts.

Q. State where it was with reference to this line of the drift—upon which side of the drift it was.

A. On the right-hand side going up the stream.

Q. On which side of the drift was the hole supposed to be sunk by Nelson and Hensley?

A. On the upper side.

Q. Was the glacier and the hole supposel to be sunk by Nelson and Hensley on the same side or on the opposite sides of the drift?

A. I don't exactly understand you.

Q. Can you mark it on this paper?

A. Here is the shaft by Meehan—this is sunk by Nelson—here is the right-hand side. About 2 feet from the end of the drift here is where they struck the glacier.

Q. Did that glacier project into the drift, or was it on a line with it?

A. It sloughed off about an inch, I should judge—as though it had struck and afterwards sloughed off around.

Q. Well, then was it flush with the line of the drift or not?

(Testimony of Norman McKay.)

A. Well, no—the glacier was in a little bit—that is, it sloughed off from the ice. It was only the thickness of about an inch more or less.

Q. Had the drift struck the glacier in the first instance apparently?

A. It didn't seem like it—I couldn't say for certain.

Q. Tell the Court the direction of this drift from the shaft made by Meehan and Larson with reference to this supposed shaft of Nelson and Hensley?

A. Well, we laid a stick across pointing direction to old shaft and I stood in the bottom and had a candle in the end of the drift—I stood in the bottom of the shaft and held my hand in that direction and looked up—we could look up and see the stick pointing in a different direction. It was not running directly for the old shaft.

Q. How much did it vary in that distance apparently? A. I could not say.

Q. State to the Court what you know about No. 3 shaft.

A. Gibbs and Nelson and I measured the distance on the surface 10 feet, more or less. The old shaft was sloughed in—both the old shafts. It was 10 feet, more or less.

Q. How wide were they across—the old shafts?

A. I could not tell as to that. There was quite a bit of snow on the glacier on top. We measured the depth of the shaft sunk by Meehan 22 feet. The distance of

(Testimony of Norman McKay.)

the drift was 10 feet—running about the same direction as the other.

Q. You state that from memory—could you not refer to your notes and tell the Court exactly?

(Objection on the ground that the notes have not been admitted.)

Mr. MILLER.—It appears that Gibbs made these notes in the presence of this witness at the time—immediately after this examination and accepted them then and approved of them at that time; it is equivalent to having made these notes, and I think that on that showing we have a right to refresh the witness' memory at this time.

The COURT.—I don't think the witness' memory seems to be very defective.

Q. Those notes were correct at the time that they were made according to your recollection then?

A. Yes, sir.

Q. Can you tell the exact distance of the drift from these notes—in No. 3 shaft? A. Ten feet.

Q. It appears that way on the notes?

Mr. CLAYPOOL.—I object on the ground that he didn't make those notes and they don't seem to be necessary.

The COURT.—He need not refer to his notes. They are not in evidence.

(Plaintiffs except.)

(Testimony of Norman McKay.)

Q. From the examination you made there how much did this drift vary from the direct court—from one shaft to the other—to No. 3?

A. I should judge 3 or 4 feet.

Q. State to the Court, if according to that variation it struck the Nelson and Hensley shaft—as to whether it was to bedrock or not.

A. I don't think that it struck the old shaft in that direction.

Q. I will ask you to state to the Court if in your opinion it struck under the corner of the old Nelson and Hensley shaft as it appeared on the surface, if it would be likely to strike the shaft at the bottom of the hole?

(Objection. Objection sustained.)

Q. Can you state that?

A. I cannot say for certain. The old shaft sloughed in so that it was 10 feet, more or less, on the surface of the drift. Ten feet plumb with the line from the edge of the hole.

Q. From what you ascertained there, would this drift strike under any portion of this Nelson and Hensley shaft?

(Objection as repetition. Objection sustained.)

Q. Did that appear to be a fair test as to the old shaft having been to bedrock?

(Objection as calling for an opinion. Objection sustained.)

Q. State the distance from the end of the shaft in

(Testimony of Norman McKay.)

the direction of the Nelson and Hensley shaft in a direct line from the one shaft to the other.

(Objection as repetition. Objection overruled.)

A. Three or four feet, as near as I can judge.

Cross-examination.

(By Mr. CLAYPOOL.)

Q. You say you have mined in Dawson since 1898?

A. Yes, sir.

Q. You are familiar with the nature of bedrock and gravel in Dawson? A. Yes, sir.

Q. How familiar were you with the nature of bedrock and gravel and other general characteristics of the ground here—what experience have you here?

A. I sunk those two holes.

Q. That was all your experience in the Tanana district?

A. I worked three months for McKinnon and Purches.

Q. What is the difference in the general nature of the ground in the Dawson country and the bedrock and gravel here, generally speaking?

A. It is different on different creeks in Dawson. On Dominion it is just exactly the same. It is similar to Dominion Creek.

GEORGE STEELSMITH, produced as a witness on behalf of plaintiffs, being duly sworn, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Where have you been during the past winter principally? A. Fairbanks Creek.

Q. What is your business?

A. I have been mining.

Q. On what portion of Fairbanks Creek?

A. I have been located on 4 Below Discovery.

Q. Do you know anything about 3 or 4 Above on Fairbanks?

A. I know where they are located and I visited those 2 claims during the winter—the latter part of the month of December.

Q. With whom?

A. I was in company with Woolridge, Crabbe and Ashenfelter.

Q. State to the Court what you did.

A. We went there for the purpose of investigating the work that had been done some short time before by Meehan or his men. For the purpose of ascertaining the depth and direction of the drifts in comparison with the work done by Nelson and Company, or others. We went on the ground and tried to find the holes—No. 1 or the one that was sunk on the right limit. The lower end of No. 4 was completely covered over with ice at that time and there had been no other work done at that

(Testimony of George Steelsmith.)

time besides Nelson's, so we didn't stop to bother with that one, but came to the one that was near the middle —or hole #2 counting from the Left Limit.

(By the COURT.)

Q. On No. 3?

A. Yes, on the upper end of 3. We found that hole and we made the measurements from the surface as to the length of the drift and the distance between the holes at the surface, and I think we took also the height and width of the drift, etc., also the direction as to that drift with the direction between the 2 holes; that is, the general trend of the drift. I have forgotten the exact figures as to the depth. It was in the neighborhood of 17 feet and the drift in the neighborhood of 12 feet. I don't remember as to an inch. It was 12 feet in length or thereabouts. We laid a pole across the top of the holes—from the center of the hole that was sunk by Meehan and the one by Nelson. The distance on the surface, I think, was about 9 feet. By laying the pole across the center of each shaft and placing a light in the back of the drift, we sighted through and ascertained the direction of the drift compared with the direction of the 2 holes, and it seemed as if there was a variation; that the drift did not run square along the space where the bottom of the shaft would have been. It seemed to dodge a little to the left looking upstream. How much I couldn't say—probably a couple of feet—at any rate, it was enough to tell that there was a variation.

(Testimony of George Steelsmith.)

Then in this drift on the left-hand side looking upstream. It looked very much as though it had cut directly under the shaft or the space where the shaft of Nelson would have struck the bedrock provided it had been carried down—we found there a glacier.

(By the COURT.)

Q. What do you mean by a glacier?

A. A pillar of ice—what we commonly call a glacier where we find ice in the ground. This didn't look like a natural glacier. The bedrock was not in place at that place. It was different from the bedrock around it—it looked as if it had undergone a change, either by excavation or sliding. What we took for the ground was the bottom of the old shaft.

(By Mr. MILLER.)

Q. What appeared to be the size of this glacier?

A. There was not a great deal of it exposed—probably 6 or 8 inches of ice. It had the form of a pillar and looked just as if it had been in a mold.

(By the COURT.)

Q. Did you dig into it?

A. Not through it, but scratched around the sides. The ground was frozen with the exception of its face. By digging above and below it, it seemed to have a rounded face, but where the gravel had been sloughed away, there it seemed to flatten, just as if the ice had been formed in a mold.

(Testimony of George Steelsmith.)

Q. Could you tell anything about the size of this glacier from the drift you were in?

A. From where it was exposed it looked as though it might have been rather a small pillar or narrow. How far it extended beyond the drift we could not tell. It looked the same as though it might have been the end of a trench dug in the shaft or the ground. It was not more than the width of a shovel blade. How for it extended from the drift we could not say.

(By Mr. MILLER.)

Q. Did you examine the base of this or could you find the base of this shaft of ice?

A. We didn't dig under this ice on account of the ground being frozen. It looked as though it had been thawed at one time, but immediately under this ice it was frozen solid. Still it seemed as if this drift had run in a little below the surface of bedrock—this drift of Meehan's.

Q. Could you tell whether this pillar of ice was larger above?

A. I could not tell as to that on account of the roof of the drift curving in.

(By the COURT.)

Q. How high was the roof of the drift at that point?

A. Probably between 2 or 3 feet. I don't remember measuring it. The drift at the back part was some two and one-half feet and this pillar of ice should be—I should judge—2 feet from the back end.

(Testimony of George Steelsmith.)

(By Mr. MILLER.)

Q. In what direction was this pillar of ice with reference to the old hole of Nelson and Hensley?

A. Well, it was what we supposed was the bottom of the old shaft.

Q. Where was it with reference to the old shaft?

A. It looked as though it was directly under it—or about where the bottom of the old shaft would be according to our measurements.

Q. As to the direction in which the drift had run would it be about the location of the Nelson and Hensley shaft? A. We considered that it was.

Q. How much of the face of that ice pillar was exposed?

A. It was probably six inches across—6 or 8 inches or something like that.

Q. Was it on a line with the drift—or did it extend into it?

A. It seemed as though the drift had barely touched it and sloughed away from it. It didn't seem as though it ran directly along the face of the drift—it was on the sidewall of the drift and seemed to have touched it enough to have sloughed down.

(By the COURT.)

Q. Afterwards? A. Afterwards.

(By Mr. MILLER.)

Q. Tell the Court what you know about #3.

(Testimony of George Steelsmith.)

A. After we finished #2 we went to hole #3 and Crabbe and Woolridge and I went down into the shaft and we made the same measurements there as we had in #2; that is, as to the depth of the shaft and the length of the drift, and we also made the measurements on the surface. I have forgotten those figures to an inch. It was in the neighborhood of 22 feet to bedrock —about 10 feet of a drift, and the holes on top, it was either 9 or 10 feet. I have forgotten exactly. The old hole of Nelson's at the surface had sloughed in or crumbled in. It was also covered with snow at that time so that I have forgotten the exact measurements. We also tried the same method of measuring the trend of the drifts. As to the direction between the 2 shafts. It seemed that there was more variation in hole #3 than there was in #2. While the drift was not so long there. There was a doubt left in my mind as to whether the drift ran under the shaft or as to whether it had reached the shaft.

Q. How much variation was there?

A. I could not say as to that. There was plenty of space for the Nelson shaft to have been to bedrock.

(By Mr. CLAYPOOL.)

Q. Why did you think that?

A. It was in the general trend of this drift between the two shafts. By laying a pole across the shafts from the center of one to the center of the other they were supposed to be almost directly down stream. The drift would take trend or something similar to that.

(Testimony of George Steelsmith.)

(By the COURT.)

Q. To the left?

A. Yes, sir—up the hill from the shaft. If this shaft should have been to bedrock the width of the drift would not take in the width of the shaft so that while there was no indication there on the face of the sidewall of the drift showing that they had been disturbed; it still left space in the bottom of that shaft according to my notion, that that shaft could have been to bedrock without this drift proving that it was not.

Q. The drift didn't strike the old shaft?

A. No, sir, it ran to the left. While there was nothing to prove that it was to bedrock I didn't consider that the drift underneath it would give it a fair test to prove that it was not.

(By Mr. MILLER.)

Q. What appeared to have been done regarding the old shaft—how much dirt appeared to have been taken out from what you could see?

A. I didn't take particular notice but if I had, I don't suppose it could have been much, because of the snow on the ground. It was hard to tell how big either shaft was, and owing to the fact that this shaft had been sunk by Meehan and the dirt taken out it would be hard to compare the amount of dirt taken from each excavation. It may have been to bedrock or it may have been that it was not so far as the pile of dirt was concerned.

(Testimony of George Steelsmith.)

Q. If it was not, would it have been likely to have been nearly to bedrock or not?

Mr. CLAYPOOL.—The witness says that he cannot tell that; objection sustained.

Mr. MILLER.—I will ask that Mr. Steelsmith may make a diagram showing these drifts and holes.

The COURT.—Very well.

The Court hereupon announced a recess until 1:30 P. M.

Court convened pursuant to recess on the same day at 1:30 P. M., and all the parties being present as heretofore mentioned, the following proceedings were had:

W. H. WOOLRIDGE, recalled, testified as follows:

(By Mr. MILLER.)

Q. Have you a diagram of the plat showing the matters you testified to this morning? A. Yes sir.,

Q. Will you produce it? A. Yes, sir.

(Witness here produces the diagram.)

Q. Is that it? A. Yes, sir.

Q. What does it show?

A. It shows the two claims No. 4 and No. 3 Above on Fairbanks. I would like to go on and say to the Court here that I marked the supposed holes about where they were, but the plat is very small. This is hole No. 2. I have made it larger on the side here so as to show you about the direction of the drift; and here is

(Testimony of W. H. Woolridge.)

hole No. 3. This (representing it) would be the drift from hole No. 3.

Q. Holes No. 2 and No. 3 here—do they represent the holes No. 2 and 3 as marked on the diagram of the claims? A. Yes, sir.

Mr. MILLER.—We desire to offer this in evidence.

The COURT.—It may be admitted in evidence as illustrative of the testimony.

OSCAR GIBBS, a witness produced on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. What is your business? A. Mining.

Q. How long and where have you mined?

A. I have mined in various parts of the world. I have been mining for the past 25 years. I have been mining in Fairbanks Creek and Cleary for the past year—a little over twelve months now. I went out to Fairbanks Creek about the 3d of June, last.

Q. How long did you mine at Fairbanks Creek?

A. I mined on Fairbanks Creek whenever I could get anything to eat. I mined there from June until early in this March.

Q. State if you know anything about placer mining claims Numbers 3 and 4 Above on Fairbanks Creek, Alaska, in the Fairbanks Mining District?

(Testimony of Oscar Gibbs.)

A. Well, I think what I know about Number 3 and 4 is what bears on this case.

Q. Is what?

A. The object that I am here for I suppose is about it —what I know about the holes that I saw. At Mr. Nelson's request I went up there in company with McKay to look up some holes that had been put down by Nelson and Hensley. I saw the hole on No. 4 pointed out by Nelson, on the right limit. There was also a hole in the center of the creek, and a hole on the right limit. Nelson explained to me what he wished me to do. He wanted me to examine the hole—that is, the hole that he told me had been put down by Meehan. I went down to the hole on the center of the creek and we made measurements and found the depth of the hole was 17 feet. There was a drift extending upstream from the hole of Meehan's and the drift was 12 feet long from our measurements. We got our measurements above on the surface and below from a plumb line. The measurements that we obtained was 9 feet on the surface and the drift below was 12 feet. At the bottom of the hole the drift was not a straight drift. It had a tendency to curve, and it was decidedly curved to the left. Whatever the idea was in driving the drift that way I cannot say—

Mr. CLAYPOOL.—We object to the witness stating his opinion as to what the idea was.

The COURT.—Just tell the facts as you found them.

(Testimony of Oscar Gibbs.)

A. Well, it appeared to me that the drift had been driven in there with something behind it. Whatever motive was—

Mr. CLAYPOOL.—I object to the witness purposely going out of his way in this manner.

The COURT.—State the facts only. Don't give your own ideas.

A. Ten feet from the hole that was sunk, on the right end of the side of the drift, there was a small piece of a glacier there, which I should say was the bottom of an old shaft that was sunk, from the color of the glacier which was black. I have encountered it dozens of times in the upper country, both in creek and bench with steam points both on creek and bench, and I kind of said to myself that it was the bottom of the hole and that—

Mr. CLAYPOOL.—Now, here the witness is going out of his way again.

The COURT.—Just state the simple facts—not your own opinion.

Q. Tell what you actually saw.

A. What I actually saw was a piece of glacier on the right-hand side of the hole.

Q. State the character of the glacier and the size of it.

A. The character of the glacier I should judge would be about 5 by 6. I don't know whether my hands is

(Testimony of Oscar Gibbs.)

that size. A little larger than my hand—a little higher but about the same length. That was showing up on the right-hand side and the drift had a curve to the left, We ascertained the direction of the old hole by placing a stick in the bottom, or rather in this hole the stick was placed on top, and I could look along and see the direction of what we presumed was the mouth of the old hole.

Q. About how much variation was there from the straight line to the old shaft?

A. There must have been at the least calculation—well that is a mighty hard thing to determine exactly—there must have been about 3 feet of a variation.

Q. State if this glacier extended below the bedrock or below the drift of Meehan's hole?

(Objection as leading and suggestive.)

The COURT.—Just state where it is.

Q. State the depth of the ice shaft, if you know.

A. I think I shall explain that. It is about 8 inches from the bottom of the drift that was run by Meehan—about 8 inches above the bottom. It was 8 inches of ice here supposing this was the bottom of the drift which would occur, I presume, because the bottom of the hole is round. When the fires burnt out they wouldn't burn out square into the corners.

Q. State as to whether the ice column projected into—

Mr. CLAYPOOL.—Oh, just state how it was.

(Testimony of Oscar Gibbs.)

A. The ice was there just the same as you would take that book and place gravel around it—so. There is the gravel here— as though that book had been placed against some gravel and you just expose this part of it.

Q. Can't you be more definite as to where this was with reference to the line of the shaft on the side where the ice was exposed?

A. I don't understand that question. Will you please explain it?

The COURT.—I think the Court understands where that piece of ice is Mr. Miller, although the Court does not wish to keep you from having this particular witness give his evidence fully about it.

A. I should judge that that ice that we exposed there—I didn't have a pick at the time and moreover I don't know whether it would have been right for me to have done any picking there. I think it would have taken very little to have proved that that was the bottom of the shaft.

Mr. CLAYPOOL.—It seems to me that is the witness' opinion again.

The COURT.—Keep to the actual apearances—what you saw there.

A. I think that is about all I know about that hole.

Q. State on which side of the hole the ice was.

A. On the right-hand side looking upstream.

Q. On which side was Nelson & Hensley's?

A. On the upstream side.

(Testimony of Oscar Gibbs.)

The COURT.—The drift?

A. Nelson and Hensley's hole is sunk down there and Meehan's hole is immediately below it.

Q. Where is the drift?

A. The drift is running upstream from Meehan's hole.

Q. On which side of Nelson's and Hensley's hole is it?

A. On the left looking upstream.

Q. Whereabouts is this ice?

A. On the right-hand side of the drift.

Q. With reference to Nelson and Hensley's hole?

A. The ice is on the right-hand side of the drift and would be on the left-hand side of Nelson and Hensley's hole looking upstream.

Q. Where is that ice exposed with reference to Nelson and Hensley's supposed shaft?

The COURT.—I think that calls for a conclusion of the witness. Let him state the facts and the Court will draw its conclusions.

Q. Did you notice the old shaft or drift of Nelson and Hensley? A. I did.

Q. What does the old drift or shaft look like—explain it?

A. The old shaft is invariably caved in from the top. Do you mean to ask me this with relation to where it was situated?

Q. What was the appearance of that?

(Testimony of Oscar Gibbs.)

A. The appearance of that was like any other old hole that had been left to remain standing until the ground off the top caved in and the top of it would naturally be enlarged. It was covered with ice and snow at the time, but we judged from its position. That is the way we obtained our measurements.

Q. How much do they usually cave in from the top?

A. Sometimes the shaft will cave in more from one side than from the other. I have noticed that frequently in the holes that I have sunk myself.

Mr. CLAYPOOL.—Does the Court desire an opinion on that proposition? We simply ask what did happen in this case.

The COURT.—State what the condition of this shaft was as shown on the surface of the ground—what the depression looked like—whether it was caved in on one side—whether it was filled with snow, and so on.

Q. Go on and state all about it.

A. The depression in the surface was larger than the hole possibly was. A hole will cave in quite a considerable if has remained with water in it.

Q. How much larger than the hole made by Nelson and Hensley?

A. I couldn't state positively owing to the snow—I should judge it would be about 6 feet in diameter.

Q. What appeared to have been the depth of it from the appearance of it as you saw it?

A. Nelson's hole? That I could not state. You see

(Testimony of Oscar Gibbs.)

an old hole will fill right up to the surface. It was filled up to the surface with ice.

A. State what you know about hole No. 3 or the hole nearest to the right limit of the claim.

A. The right limit hole we measured and the depth was 22 feet. Our surface measurement was 10 feet. The drift also was taken of it in measurements and we measured from a plumb-line also. The direction of the drift appeared to me to lead to the left of the hole. I would not consider that it was a drift. It was only a small shovel hole that was at the back there—very small, just about the size of a tomato box at the back. Just so that you could get a shovel in and draw it out.

Q. State how you obtained your measurements and what they were and all about it.

A. I think I explained that a moment ago—all about it.

The COURT.—Yes, I think the witness has explained that very fully already.

Q. State if you have any knowledge of the variation of the drift of the shaft from the supposed Nelson and Hensley shaft.

A. At the back end of the hole it must have varied at least 3 feet. We obtained the direction of that hole. It was getting a little dark but I placed the stick in the bottom of the hole looking right at the center of the drift on the back and left the candle there and when I got on top there was the stick pointing off to the left and there was Nelson's hole to the right of the stick.

(Testimony of Oscar Gibbs.)

Q. Who was with you?

A. McKay and Nelson.

Q. Anyone else? A. No, sir.

Cross-examination.

(By Mr. CLAYPOOL.)

Q. What time of year was this?

A. The 12th of February, 1904.

Q. What was the condition of the ground generally as to snow and ice about that time?

A. There was quite considerable snow.

Q. Heavy snow on the ground?

A. Well, there was not any very heavy snow last winter.

Q. As heavy as during the season? A. Yes, sir.

Q. About how deep?

A. Probably 12 or 13 inches on the level.

Q. From what do you judge that the size of the top of the hole was only 6 feet?

A. I could see the edge of the ice from where it had been broken.

Q. On the edge of the hole? A. Yes, sir.

Q. How could you see the ice when there was snow on the top of it?

A. There was a hole cut in that ice.

Q. From the top of the hole? A. Yes, sir.

Q. Do you know who cut it? A. No, sir.

Q. Do you know what particular place on the hole

(Testimony of Oscar Gibbs.)

this ice was cut—whether it was in the center or on the side?

A. I think myself it was cut from about the center to about the side.

Q. On what do you found that opinion?

A. I think I can explain that.

Q. Well, that is what I meant to ask you to do.

A. This hole was not filled right up to the surface with ice and if there is a depression on the surface and the snow falls on it the wind blowing it about will leave a little dust around the hole or in any other place that there is a depression in and that is just what occurred there.

Q. You say that a hole had been cut in this ice and the ice and snow thrown out to one side.

A. That I did not say.

Q. Well, was it so or not?

A. Possibly it had fallen in.

Q. There was a hole cut in the ice then and the snow had fallen in the hole?

A. I suppose that could have occurred.

Q. It did occur in this case?

A. I don't know as to that.

Q. Did you examine it to see?

A. I don't think there was any inside.

Q. Well, did you do that? A. No, sir.

Q. Did you see any ice or snow taken out of this hole round about there? A. No, sir.

Q. A hole in the ice had been cut? A. Yes, sir.

(Testimony of Oscar Gibbs.)

Q. You don't know in what particular region of the shaft this ice hole was cut?

A. I have said already it was cut from the center to the outer rim.

Q. I want you to explain why you say that.

A. I think I have explained that already pretty fully.

Q. Well, please explain it again.

A. I explained to you that the outer edge of the hole I should judge would be about where the depression in the snow ceased.

Q. That was the center of the depression.

A. It was just from what I should judge was the center of the hole to the outer rim.

Q. From the depression in the snow generally left at this ice hole that appeared to be the dimensions as shown by the snow?

A. About six feet in diameter, as I have stated already.

Q. What would they indicate as to the size of the hole underneath the hole?

A. It would indicate that there must have been a hole there. I forget the exact figures now to find the circumference from the diameter. Something like three times and a third, is it not?

Q. That is what you judged the size of the hole from?

A. Yes, that is the condition in which I found it.

Q. Now, as a miner don't you know as a matter of fact that these holes are generally of uniform size?

(Testimony of Oscar Gibbs.)

A. They dig them square but if you leave them stand they will cave in.

Q. What is the general size of the prospect hole?

A. It is about five feet by 2 feet, 6 inches.

Q. You don't know what the size of this one was originally? A. No, sir.

W. G. CRABBE, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. What is your business? A. Miner.

Q. Where were you last winter principally?

A. On Fairbanks Creek.

Q. Whereabouts on Fairbanks?

A. On 1 Above and 3 Below.

Q. What doing?

A. I was putting a hole down on 1 Above—I had a lay there.

Q. State if at any time last winter you went upon 3 and 4 with a view of inspecting some work supposed to have been done there by Meehan and Larson.

A. Me and Woolridge and Steelsmith and Geo. Ashenfelter went up to look over the work that had been done and measure the ground. We went up to 3 and 4 about where the line was between 3 and 4 and crossed over and came to the first hole. It was glaciered over the top so we could not see anything there, so we went

(Testimony of W. G. Crabbe.)

over to what I should call the second hole from where the trail is on this side and we measured the hole that Meehan had put down. It was right below the hole that Nelson had put in—about 10 feet below, I should judge, downstream. We measured the depth of the hole and went down the hole and measured the drift to where the other hole was that Nelson had put down.

Q. Regarding the middle hole of the three next to No. 2 state what you did there.

A. We went to work there and laid a pole across the top as near as we could judge fair up and downstream with the other hole and went down below and measured it. Then we measured the distance of the hole back—each of them at the drift. They had drifted back about 10 feet I think. I have the figures of it. I put them down when I was down there.

Q. Can you refer to the figures and tell exactly?

A. I think I can.

(Witness here refers to a note book.)

Q. Who made that? A. I made this myself.

Q. State the depth you went in the drift.

(Object as leading; objection sustained.)

The COURT.—When was it made?

A. On the 24th of December.

Q. At this place? A. Yes, sir.

Q. Does that show the depth measured from the surface down? A. Yes, sir.

(Testimony of W. G. Crabbe.)

Q. What is that? A. Sixteen feet and 7 inches.

Q. And the depth of the drift—the extent of the drift? A. Twelve feet and 2 inches.

Q. In what direction was it?

A. Running upstream.

Q. In what direction with reference to Nelson and Hensley's shaft?

A. It was upstream toward their shaft.

Q. State what measurements you made with reference to its striking this shaft.

A. It had run right back by this shaft, as near as we could tell. It bore off a little to the left and right down in there there was a small piece of ice that looked like the bottom of the hole.

Q. How did it look?

A. Something as if there had been a seepage of water running in there.

Q. How much is this ice?

A. There was about 10 or 12 inches probably in sight —might not be quite that size.

Q. On which side?

A. On the right-hand side as the drift ran out of the hole.

Q. On which side of the drift was the Nelson and Hensley shaft.

A. On the right-hand side going upstream.

Q. How near was the ice to the end of the shaft?

A. Within about 2 feet.

(Testimony of W. G. Crabbe.)

Q. Can you state how much this shaft varied to the left of the Nelson and Hensley shaft?

A. I didn't figure it varied over about 2 feet.

Q. What did you do ascertain what it varied, if anything?

A. We had the pole across the top and then went by that.

Q. How did you go by that?

A. From the string hanging down from above—the rope which we had there and let down, and then we sighted back from that.

Q. Were you in a position to see—to locate the end of the drift with reference to the pole across the top?

Mr. CLAYPOOL.—That calls for a conclusion of the witness. The Court is a judge of that.

Q. State your position.

A. At the bottom of the hole and Woolridge holding a candle at the back of the hole where it had drifted in.

Q. Tell what you know about hole No. 3. That is, the hole nearest to the right limit of the claim.

A. We went to hole No. 3 and measured that from the top—put the same stick across to get the center location of the hole—it was 22 feet and 8 inches deep. The length of the drift was 10 feet 4 inches as it ran in and as near as we could come to telling from our pole on the top, it was bearing off to the left.

Q. How much?

(Testimony of W. G. Crabbe.)

A. About 4 or 5 feet anyway at the least. I could not exactly tell. The angles was not taken.

Q. Could you tell whether it would strike the Nelson and Hensley shaft from what you saw?

A. I should not judge myself that it would strike the Nelson and Hensley shaft at all.

GEORGE ASHENFELTER, being produced as a witness on behalf of plaintiffs, testified as follows:

Direct Examination.

(By Mr. MILLER.)

Q. Where do you live? A. On Fairbanks.

Q. What is your business? A. Mining.

Q. How long have you lived in Fairbanks?

A. Eighteen months.

Q. Are you acquainted with mining claims Nos. 3 and 4 Above on Fairbanks Creek? A. I am.

Q. Whereabouts have you been located out there with reference to those claims?

A. Opposite No. 3 Above.

Q. Do you own property on Fairbanks Creek?

A. Not on Fairbanks Creek proper but on benches on Crane Creek. Discovery on Crane Creek and Bench opposite 2, 3, and 4 Above.

Q. Do you know the bench opposite 3 Above on Fairbanks Creek? A. Yes, sir.

Q. When were you on that and during what time?

(Testimony of George Ashenfelter.)

A. I went over to Fairbanks Creek a year ago round the 1st of April and I have been there ever since.

Q. Do you know of Meehan and Larson being there any time during April or May?

A. I think Meehan was out there in the latter part of April.

Q. Was he out there before—during the latter part of that winter? A. Before April?

Q. When was he first out there during the spring of 1903?

A. I could not just say the date—somewhere along about the 20th of April—the latter part of April.

Q. Were you there about No. 3 after that during the summer months? A. I was.

Q. Are you familiar with the work Nelson and Hensley have done out there?

A. I can't say that I am familiar with it—I have seen the holes.

Q. Did you see the holes before they filled with water? A. No, sir.

Q. Did you see them before they caved in?

A. They had caved some before ever I seen them.

Q. Do you know when they were made?

A. I do not.

Q. Do you know about when?

A. No, sir; I could not say that—I kept no track of Fairbanks Creek.

Q. When did you first see them?

(Testimony of George Ashenfelter.)

A. I seen one of them just from a distance in April—just noticed it.

Q. When did you see the others?

A. Just about the time the snow was going off.

Q. What was the appearance of the dumps of dirt that had been taken out of it—what you could see of them—what did they look like?

A. I could not say as I took particular notice of the holes. I went up there with Billy James to get something—no, it was with his partner, and we never paid much attention.

Q. How were the holes as to size—state what your impressions were as to the probable depth of the holes.

A. Well, I could not do that.

Q. You can give a general idea—just state what your impressions were.

Mr. CLAYPOOL.—I think that is calling for an opinion of the witness.

The COURT.—He may answer the question—he may tell whether they were 6 inches or 60 feet.

A. I would not put it anywhere there—I would say anywhere from 10 to 15 or 20 feet. I would not give any positive figure because I didn't pay much attention to it myself.

Q. Do you know the depth to bedrock in that locality?

A. I could not say as I do on this side of the creek.

(Testimony of George Ashenfelter.)

Q. Did there appear to be as much work done on the holes on the left limit as on the hole on the right limit?

A. I don't know. There was a good deal of bedrock around that hole on the left limit in the creek. I could not say as to the work on the right limit. I panned from that hole at the left limit, but I never did pan from the other holes.

Q. Did you notice the hole on the right limit particularly.

A. On the left limit—on the lower end of No. 4.

Q. You didn't go over to the holes so much?

A. No, sir.

Q. Did the size of the dumps appear to be as much one place as the other?

A. I could not hardly say as to that whether they were or were not—I didn't pay much attention to the holes.

Q. What were the depth of the holes when you saw them as far as you could notice?

(Objection as repetition. Objection sustained.)

Q. What did you do or what did you ascertain regarding those holes, if anything, at the time you were there with those parties that you spoke of?

A. Woolridge asked me if I knew where the holes were and I told him I did. He asked me if I would go and show him where the holes were. I went with him and helped lower him into the hole ond draw him outand laid the stick across the hole and took the measure-

(Testimony of George Ashenfelter.)

ments. I took them as near as I could across the center of the hole.

Q. Did you go into the hole? A. I did not.

Q. Do you know the deptL of it?

A. I could not say anything more than what I had read to-day.

Cross-examination.

(By Mr. CLAYPOOL.)

Q. Did you go to the other holes at all?

A. I went up there.

Q. Referring now to the time when you say you saw considerable bedrock last summer?

A. I was up there twice—once when I went after someone and once going up the hill I passed by the holes.

Q. Was there a windlass at that time there?

A. There was.

Q. At which hole?

A. I would not say whether it was 2 or 3 but one of those two.

Q. Can you state now or did you observe how much gravel there was about that hole where the windlass was?

A. I didn't pay much attention to it. The first time I was there there was considerable snow on the ground and the second time we was just passing up going to Bear Creek.

JAMES McPIKE, a witness produced on behalf of the plaintiffs, being duly sworn, testifies as follows:

Direct Examination.

(By Mr. MILLER.)

Q. What is your business? A. Mining.

Q. Where have you been mining?

A. Fairbanks.

Q. Whereabouts with reference to No. 3 and No. 4 Above on Fairbanks?

A. I was there at the time this man Mr. Nelson was working there.

Q. When was that according to the best of your recollection?

A. The latter part of January and February.

Q. Of what year?

A. 1903 I was there, I guess about a week or 10 days ahead of these men.

Q. Who was the first person to commence work on Fairbanks Creek?

A. Jean Farrington, I think.

Q. Who was the next?

A. I think I was the next.

Q. And who next? A. Nelson, I believe.

Q. Were there any holes to bedrock on Fairbanks Creek at the time Nelson and Hensley commenced work there? A. I don't think so.

Q. When did they begin with reference to the time you began?

(Testimony of James McPike.)

A. It must have been along in February about the 5th or 6th, somewheres along there, I believe.

Q. How many days apart were you in commencing work there?

A. That I could not state for certain. I must have been at work there a week or ten days ahead of these men.

Q. State who put the first holes to bedrock on Fairbanks.

(Objection as immaterial. Objection sustained.)

Q. Had any one gone to bedrock on that creek at the time they commenced work there?

A. Not that I know of.

Q. How near were you to their work at the time they were working there in February.

A. I was on 1 Above and they were on the upper end of 3 Above, I believe.

Q. Were you about where they were working occasionally?

A. I think I was up there about three times while they were at work there.

Q. State to the Court all you know about it.

A. I was working up to their place when we were working there about three times, I guess.

Q. Who else was in the vicinity of those claims at the time they were working there besides yourself or within four or five claims of them?

A. I don't know of anybody.

(Testimony of James McPike.)

Q. There were not many people on Fairbanks Creek at that time? A. No, sir.

Q. State what you saw when you went up there?

A. I went up there the second time and they had one hole to bedrock—the first one they started.

Q. That was when you went up the second time?

A. Yes, sir.

Q. What were they doing when you went up the third time? A. Working on two other holes.

Q. Did you go to the hole nearest the right limit of No. 3? A. Yes, sir.

Q. Did you meet Nelson and Hensley there at that time? A. Yes, sir.

Q. What were they doing?

A. Hoisting out of the hole.

Q. About how deep was the hole at that time?

A. It looked to be about 15 or 16 feet, I should judge.

Q. That was hole No. 3.

A. The farthest to the right limit.

Q. What do you know about No. 2.

A. I have never been there when they were hoisting out of that hole. There was still a fire there at the time I was there.

Q. Had much dirt been taken out of it?

A. Quite a little.

(By the COURT.)

Q. How deep was it to the best of your judgment?

(Testimony of James McPike.)

A. I should judge it was about 15 feet. Somewhere about there—about 15 or 16 feet.

Q. That is hole No. 2? A. Yes, sir.

Q. Did you see the holes afterwards?

A. No, sir.

Q. Did you see the dumps and the dirt taken out?

A. At that time but not afterwards.

Q. Did you afterwards? A. No, sir.

Q. Do you know how long they worked after you were there?

A. I should judge they would be working a week after I was there.

Cross-examination.

(By Mr. CLAYPOOL.)

Q. How do you know they were working a week. What did you judge that from. Did you see them?

A. I was working there a week or 10 days after I was the last time.

Q. That is the last you were working when you were there? A. Yes, sir.

Q. When did you next see these men?

A. We all left the creek together.

Q. They came up where you were?

A. I was on my way coming up to where they were.

Q. You went up with them? A. Yes, sir.

Q. That is all you know about the work?

A. Yes, sir.

Q. You don't know whether they worked it or not?

(Testimony of James McPike.)

A. I could see smoke there from the holes from where I was.

Q. As near as you can remember it would be a week after that? A. Yes, sir.

Q. How many holes—one or two? A. One.

O. A. NELSON, recalled, testified as follows:

(By Mr. MILLER.)

Q. Will you state the size of the shaft you made?

A. It was just big enough to work in with a short handled shovel.

Q. I was asking you the size.

A. About 2½ by 4½ and it may be by 4.

Q. Do you remember Mr. McPike having been up there? A. I do.

Q. Do you remember him having been there at the time you were working in shaft No. 3? A. Yes, sir.

Q. What depth were you down at that time, if you remember?

A. As near as I can recollect we were 4 or 5 or maybe 6 feet in the gravel.

Q. How deep was the hole entirely from the top?

A. From 12 to 13 feet of muck. It was too deep to throw out with a shovel—we had to use a windlass.

Q. What was the depth from the surface?

A. Sixteen or seventeen feet.

Q. How long did you continue there after McPike was there? A. About 10 days.

(Testimony of O. A. Nelson.)

Q. Did anyone with you inform you regarding the lines between 3 and 4? A. They did not.

Q. You went and located them yourself?

A. Yes, sir.

Q. State if you took any measurements at the time as to the distance you sunk these holes—No. 2 and 3—from the center stake. A. I stepped them off.

Q. Were there any corner stakes at that time?

A. I could not find any.

Q. Did you afterwards make any effort to get the exact distance from the center stake? A. I did.

Q. In what way and how? A. Tape line.

Q. How many feet was it?

A. Two hundred and seventy-five.

Q. Whereabouts was this hole? In this mining district?

A. In this mining district—Fairbanks District.

Q. In what State, territory or district?

A. Alaska?

BEN CHASE, a witness produced on behalf of the plaintiffs, being duly sworn, testified as follows:

(By Mr. MILLER.)

Q. Have you been up on Fairbanks Creek at any time? A. I have.

Q. Do you know anything about the location of 3 and 4 Above? A. Yes, sir.

Q. You know the claims? A. Yes, sir.

Q. Have you ever been on them? A. I have.

(Testimony of Ben Chase.)

Q. Did you ever examine the initial or center stake of 3 and 4? A. Yes, sir.

Q. On the boundary between 3 and 4?

A. Yes, sir.

Q. Do you know anything about the distance of those shafts from the center stake? A. Yes, sir.

Q. How did you ascertain it?

A. By measuring with a tape line.

Q. State the distance.

A. From the center stake to the outside hole 275 feet.

GUSTAV A. LAM, a witness produced on behalf of the plaintiffs, being duly sworn, testified as follows:

(By Mr. MILLER.)

Q. Where do you reside?

A. At Fairbanks or over in Graehl City.

Q. Are you familiar with the mining claims out there? A. I have been out there twice.

Q. Do you know anything about 3 and 4 Above?

A. A little.

Q. Did you ever examine the center stake between 3 and 4? A. I did.

Q. Do you know anything about the distance of these shafts that have been testified to from that center stake?

A. Two hundred and seventy-five feet to the outside shaft.

Q. On which limit? A. Right limit.

GEORGE STEELSMITH, recalled, testified as follows:

(By Mr. MILLER.)

Q. State what this paper is.

A. I have here a diagram of the prospect holes showing the relative positions of the holes dug by Nelson and others and also the holes and the drift dug by Meehan near the said holes known as No. 2 and 3 on the upper end of creek claim No. 4 Above Discovery on Fairbanks Creek in the Third Division of the District of Alaska.

Mr. CLAYPOOL.—I wish the witness to note on the diagram that the examination was made at a certain date.

The WITNESS.—There is a certain date that this examination was made.

The COURT.—Write "Examination made on the —— day of ————."

(Witness writes "Examination made on the 24th day of December, 1903.")

The WITNESS.—This diagram was made from the examination of the work made on the 24th day of December, 1903.

Mr. MILLER.—There is one fact that I wish to testify to.

H. J. MILLER, a witness produced on behalf of the plaintiffs, being first duly sworn, testified as follows:

I will state that I prepared a deed for Messrs. Nelson and Hensley sometime in May. I advised with them with a view to a settlement of their claims in regard to the mining claim No. 3 Above on Fairbanks Creek and that later and about the early part of July they turned all their mattters over to me.

The COURT.—What year are you talking about now?

A. 1903, your Honor. They requested me to close up the matter, and secure their claim to an undivided one-half interest in the claim under their contract; that I referred to one Meehan—

Mr. CLAYPOOL.—And they didn't settle it up and finally brought suit and that is all there is about it.

The COURT.—Yes, unless there are some statements that were made, of importance.

Mr. MILLER.—And once or twice to Mr. Larson and Mr. Larson told me about August that he thought the boys did the work and that so far as he was concerned they should have their claim, and that sometime later I presented certain papers to Mr. Meehan and insisted on his signing them conveying an interest in the claim to Nelson and Hensley, and he refused.

The COURT.—Is that all?

Mr. MILLER.—That is all.

Plaintiffs rest.

THOMAS LARSON, one of the defendants herein, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. Thomas Larson.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. One of the parties to this agreement made with Nelson and Hensley? A. Yes, sir.

Q. About sinking 3 holes on these claims?

A. Yes, to bedrock.

Q. You have heard the testimony of the last witness on the stand? A. Yes, sir.

Q. You may state to the Court whether or not you ever told him anything of that kind. A. No, sir.

Q. Did you ever have any conversation to that effect?

A. I might have had some conversation about the holes.

Q. Did you ever tell Mr. Miller that they had done the work? A. No, sir.

Q. Did you ever say anything like that?

A. No, sir.

Q. When was it that you first went down to those claims with reference to the work claimed to have been performed by Nelson and Hensley—about when was it when you first went down there—what was the date when you first went there after they were supposed to have done the work—do you remember when they quit working?

(Testimony of Thomas Larson.)

A. It was some time in July. I was over on Gold Stream most of the time.

Q. About a year ago now? A year ago this month?

A. Yes, sir.

Q. Calling this hole No. 1, this No. 2 and this No. 3, I will ask you to state to the Court if that represents the situation with approximate correctness?

A. Yes, it is somewhere about right. They are all on the right limit from the center stake.

Q. Did you make an examination of the work that had been done there? A. Yes, sir.

Q. When the first time?

A. Made a surface examination sometime in July.

Q. Who was with you?

A. I believe Mat was with me.

Q. Anyone else? A. No, sir.

Q. What did you do?

A. Went over and poked sticks in the holes.

Q. Anything else?

A. We went to the farthest hole and by the surface you could see that the dirt that had been taken out there there was nowhere near the amount of dirt that would indicate the output of that hole.

Q. Before going to that, I will ask you about the first hole—No. 1—as to whether or not bedrock had been taken out? A. That hole went to bedrock.

Q. There had never been any trouble about that hole? A. No, sir.

Q. What was the condition of No. 2 at that time?

(Testimony of Thomas Larson.)

A. It didn't show any bedrock on the surface. You can generally see if there is any bedrock comes out of the hole.

Q. Well, was there any there? A. No, sir.

Q. What was the extent of your examination—how carefully did you examine?

A. Went over the gravel all ourselves. There was nothing there that would indicate bedrock to me.

Q. Coming to the third hole, what did you find there in the output?

A. I should judge it went through the muck, it seemd to me to be scattered all over the top of the holes.

Q. At this visit did you go into either of the holes number 2 or 3?

A. No, sir. Could not go into them, they were full of water.

Q. What else did you observe—were they caved in any? A. Some.

Q. Which one?

A. They were all more or less caved.

Q. Which one the most?

A. The one on the creek—the one with the bedrock.

Q. What about those other two, where they were caved in? A. Oh, well, if you ask me—

Q. If you don't remember, say so.

A. No. I would not take them to be very badly caved in.

Q. Was that the extent of your examination at that time? A. Yes, sir.

(Testimony of Thomas Larson.)

Q. When did you next go on that ground with reference to that work said to have ben done by these men?

A. I have been up and down that creek I could not tell how many times.

Q. I mean next time you made any examination of the work—if you took any other measurements or if you did anything of that kind—state as nearly as you can remember.

A. I think I made an examination in April.

Q. Of this year? A. Yes, sir.

Q. When you went there in April what was the condition of the ground with reference to those holes 2 and 3. Had the holes been sunk or drifted?

A. Yes, I think they were drifted.

Q. What did you do then?

A. I thought I could get some witnesses and get them to go down the hole?

Q. With you?

A. I stayed up above and let them do the examining.

Q. What did you do, if anything?

A. I tried to help them up and out of the hole.

Q. Did you at that time make any examination of this ground? A. I left that to the witnesses.

Q. Did you take any measurements?

A. No, sir.

Q. With reference to the direction of these drifts did you do anything on the surface by way of assisting the witnesses whom you say you sent below in order to ascertain the direction of the drifts?

(Testimony of Thomas Larson.)

A. I helped a little, but there was a man with me so I let him do it.

Q. What was done about that in your presence?

A. Judging from above, from the surface, this hole No. 2 bore off to the left.

Q. About how much?

A. I should judge from above that it just about would strike the corner of No. 2.

Q. What about the other one—No. 3?

A. I was there when they measured this hole and measured the drift and I found that this hole was just as straight for that other hole as any engineer could do it.

Q. The indications from the surface were that they went right through? A. Yes, sir.

Q. What method did you pursue in ascertaining it?

A. I was up above and told the men what to use. They used a stick down below and used a tape line up on top and a compass I had too and I put that down on the memo.—the center from one hole to the center of the other.

Q. Have you that memo? A. Yes, sir.

Q. When was it made?

A. It was made in April.

Q. At the time of doing this work?

A. Yes, sir. Mr. Ziemer was with me.

Q. You say you didn't go down the holes yourself at any time?

(Testimony of Thomas Larson.)

A. I went down but I didn't go down as a witness or anything. I let the others do that. I didn't go down to take the dimensions.

Cross-examination.

(By Mr. MILLER.)

Q. Who were these witnesses you had there?

A. It was Nathan Ziemer.

Q. Who else? A. Jack McCormack.

Q. Who else? A. Jack Crowley.

Q. Who else? A. George Bell.

Q. Who else? A. That is all.

Q. When was this?

A. Sometime in April—I could not say the date.

Q. What time in April?

A. I think it was around the 12th—I could not just say. I have got memorandums when I went out.

Q. Where is it? A. Out on the creek.

Q. The shafts on the creek like this were more or less filled with water?

A. There was not any water there.

Q. Where? A. In the shaft.

Q. How was it in No. 2?

A. There was a little piece of ice—that is the only thing I could see.

Q. In the bottom? A. Yes, sir.

Q. That had been caused by the water running in from the top and freezing?

A. I could not really say.

(Testimony of Thomas Larson.)

The COURT.—The new shaft or the old?

Mr. MILLER.—I am talking about your shaft and drift that you made to test Nelson and Hensley's shaft—the middle hole.

A. I didn't see any water except what I just told you.

Q. There had been water in there and it had frozen?

A. I could not see any.

Q. You had nothing to do with the work yourself?

A. Not personally.

Q. Why did you go to these holes in April?

A. To examine them.

Q. Why did you go to examine them?

A. Because it was to my interest to examine them.

Q. Did you notify Nelson and Hensley or anyone else representing them?

A. Not at that time but we told him last fall that we would pay his expenses if he would come out and just watch us examine them holes; that we would pay them just as much wages as they could get any place else.

Q. Did you go and tell them? A. No, sir.

Q. Well, talk about something you know about.

A. Yes, sir, I did tell him.

Q. You didn't notify them when you went there in April? A. No, sir.

Q. You testified that you first went out there in July after this work was done on the part of Nelson and Hensley? A. Yes, sir.

(Testimony of Thomas Larson.)

Q. Did you meet them any time shortly after they finished the work and quit work?

A. The only time I met them was when they finished the work and came over when I was on Gold Stream.

Q. Why didn't you go back then and look at those holes?

A. When we made the suggestion of going over there they told us it would take us two days to get over the snow, and it kind of discouraged us from going over.

Q. They had been over there and came and got grub and went back again? A. Yes, sir.

Q. You were discouraged from going over at that time?

A. If you had done as much mushing about the country as I have done you would be discouraged.

Q. State to the Court when the first trip you made over there to examine these holes was. A. In July.

Q. When was Meehan over?

A. Some time in April.

Q. Of what year? A. 1903.

Q. Was Meehan with you in July?

A. Yes, sir.

Q. What were you over there for?

A. We had quite a few interests over there.

Q. Did you make it your business while you were over there you and Meehan while you were over there to examine these holes?

A. Yes, sir. We went to these holes.

Q. What did you go to examine them for?

(Testimony of Thomas Larson.)

A. Because we were told that they looked suspicious —that the work hadn't been done on them.

Q. And this was the first time you made an effort to find out?

A. For myself—yes, sir—it was the first time I did.

Q. Meehan was with you? A. Yes, sir.

Q. State what you did—I believe you stated you put a stick in the hole.

A. Yes, just to see the depth.

Q. How deep were they?

A. I should judge perhaps about 8 feet—the upper one was about 8 feet.

Q. Which was the upper one?

A. On claim No. 3. I should judge it to be about 9 feet.

Q. I believe you stated on your direct examination that they had caved in some.

A. Yes, I believe they had caved a little.

Q. It was about this time of year a year ago that you were up there? A. Yes, about this time.

Q. A year ago? A. Yes, sir.

Q. How much water was there in it?

A. It was not quite at the top—perhaps a foot from the top.

Q. That is all the information you could get as to whether they had been to bedrock—by poking that stick into the water.

A. No, sir, the indications on the top, the ground and

(Testimony of Thomas Larson.)

the slope of the creek showed that there was not dirt enough on that one hole taken out of it—the hole showed that they had not went to bedrock.

Q. You just judge in a general way by the dirt taken out? A. Well, I feel pretty confident.

Q. Isn't it true that when the snow goes off and the water is running it takes considerable dirt away with it.

A. Not so very much.

Q. And that the hole sloughing in, it also carries a portion of the dirt back into the hole? A. Yes, sir.

Q. How much dirt had caved in from the bank, and how much had gone back into the hole.

A. It was not caved in very bad.

Q. You put a stick in No. 2 also—how deep did you find that was? A. That was a good deal deeper.

Q. How much deeper?

A. We couldn't tell by poking the stick in—I guess 10 or 12 feet.

Q. That was No. 2? A. Yes, sir.

Q. How deep was No. 3. A. About 9 feet.

Q. How deep was No. 1?

A. I didn't measure that at all—I could not say.

Q. If they had stopped when they got to bedrock, there would be very little bedrock on the surface?

A. Yes, sir.

Q. They would take the gravel off and the gravel would be on the surface?

A. No, sir, the gravel would be on the surface.

(Testimony of Thomas Larson.)

Q. If they would take the gravel from the bedrock?

A. Yes, sir, the bedrock would be on the surface.

Q. If they had dug to it and left it in the hole?

A. I didn't catch the drift of the question.

The COURT.—I don't think that is very important—I think it is self-evident.

Q. You say No. 1 was on bedrock?

A. Yes, you could see the bedrock.

Q. Do you know how deep it was to bedrock?

A. No, sir.

Q. Do you know how deep it is now?

A. No, sir.

Q. These claims were not of much value, or of any known value when Nelson and Hensley went out there—they were simply wildcats?

A. There was not anything there of much value then.

Q. In July and April you knew that gold had been found on Fairbanks Creek and on this property as well?

A. Yes, sir.

Q. And you panned on No. 1, didn't you—the shaft that Nelson and Hensley sunk? A. No, sir.

Q. Did Meehan? A. I cannot say.

Q. Did he ever tell you so? A. I think he did.

Q. What did he get? A. He didn't say.

Q. State to the best of your knowledge did he ever state to you that he got 6 and 7¢ dirt?

A. I can't say he did.

Q. When did you sink these shafts?

(Testimony of Thomas Larson.)

A. Which?

Q. Shafts No. 2 and 3.

A. Some time in November, 1903.

Q. Why did you do it?

A. Because they felt pretty certain that the contract was not fulfilled and because we got reports from all around the country. The prospects in that one hole —No. 1—was what we had the reports about; that was what drawed my attention to the fact that there was something that was not what it ought to be. There is people here testifying on this side that can tell you what prospects they got.

Q. What did they get?

A. Oh, they will testify after awhile. They got 12 pans that went 44¢ or something like that.

Q. That is the reason you sank those holes?

A. No, sir, we sank because we didn't believe they fulfilled their contract.

Q. Because you didn't know whether they did or not?

A. We had a good proof.

Q. This effort you made there to get a proof is the only proof you have?

(Objection as immaterial. Objection sustained.)

Q. Property constantly increased in value on Fairbanks Creek from the time these shafts were sunk?

(Objection as immaterial. Objection overruled.)

A. Yes, and who helped to increase it?

Q. Well, I don't care to talk about that. This claim you had refused $50,000.00 for at that particular time?

(Testimony of Thomas Larson.)

A. No, sir.

Q. It was worth it, was it not?

By the COURT.—This is quite immaterial. I don't think the value has anything to do with it. He says that the property had constantly increased in value and that is admitted.

Q. You heard what some of these witnessess—Steelsmith and Woolridge and others—testified the other day? A. Yes, sir.

Q. You heard them testify about this shaft No. 2 that you sank there or caused to be sunk?

A. Yes, sir.

Q. Regarding this glacier or shaft of ice you came in contact with in sinking that drift, you heard them testify to that, now what do you know about it?

A. I saw the ice in the hole, but it was above bedrock.

Q. You have admitted bedrock in hole No. 2.

A. I never admitted that that was the bedrock. No, sir, I said to you that I could not see any bedrock on top.

Q. Has not Meehan admitted bedrock in No. 2 in your presence? A. I don't think he has.

Q. Have not men who worked on that drift told you that they were satisfied of it?

(Objection on the ground that the question is too indefinite.)

The COURT.—Ask specifically about the persons who were present and when and where it was.

(Testimony of Thomas Larson.)

Q. Haven't you stated in the presence of Mr. O'Neil that sometime during the early part of the winter shortly after the work was done you had conceded bedrock, except in hole No. 3, sometime after November?

A. No, sir.

Q. Well, when was it?

A. When I went down and saw that piece of ice I thought we were giving them that hole.

Q. Why didn't you give it them? A. No. 3?

Q. No. 3.

A. Why should I, can you tell me why?

The COURT.—Confine yourselves to the facts.

Q. You stated that your principal reason for testing these holes was because there was gravel thrown over the dumps and no bedrock in those two holes No. 2 and 3.

A. There is three holes that I spoke about the gravel being thrown out. Bedrock had been taken out in No. 2, but it looked as if they had tried to spread gravel over No. 3.

Q. Was there any bedrock on No. 2?

A. I could not see any.

Q. You could see as much on No. 2 as you could on No. 3?

A. Why, there was no gravel hardly at all on No. 3, in a deep hole like that. They had taken gravel out and spread it over the dump to make it show—just about three buckets.

(Testimony of Thomas Larson.)

Q. There was as much bedrock on 2 as on 3?

A. When you get to bedrock or close to it you can tell by the color of the rock and the size of the rock. When you find small pebbles that shows it ain't as if it was not anywheres near the bedrock. When you get big wash and you can see the sediment on them, it shows that it is getting close to bedrock in a gold-bearing creek.

Q. You could not find this evidence on No. 2 of being near to bedrock?

A. It looked as if it was near to bedrock. If it was not to bedrock it looked as if it was pretty close to it.

Q. You believed it was not the bedrock or you would never have been at the pains of sinking the shaft?

A. When we have to thaw we can sink 2 holes as quickly as one. We didn't investigate that very close.

Q. You didn't investigate 2 very close?

A. We didn't investigate 2 very close.

Q. You had no means of knowing whether Nelson and Hensley were right in their statements without a further examination and testiing things in the way you did by sinking shafts?

A. No, sir—well, perhaps we could someway by cleaning out the shafts.

Q. I talked with you several times last fall regarding this matter? A. I don't remember.

Q. You don't remember any conversation with me regarding the claim of Nelson and Hensley to this property? A. No, sir.

(Testimony of Thomas Larson.)

Q. Don't you remember a statement from me sometime about last August—

Mr. CLAYPOOL.—I don't know whether it is proper to impeach the witness by conversation with counsel for the other side.

The COURT.—The Court does not care to hear anything about any settlement, Mr. Miller.

Q. Do you remember a conversation with me about last August at Fairbanks here in which you stated that so far as you were concerned you would be glad to see the boys get something for the work that they had done out there? A. No, sir.

Q. Some conversation to that effect?

A. At what time?

Q. About last August or September?

A. No, sir.

Q. Well, when was the conversation?

A. I don't know of any such conversation.

Q. Well, some conversation along that line or to that effect?

A. No, sir, I can't remember anything like that.

Q. But you do remember my having spoken to you about it?

A. I can't really say—that is something that has escaped my memory because we have spoken together whenever we met.

Q. Then the only means you had of knowing satis-

(Testimony of Thomas Larson.)

factorily that they were at bedrock till you sunk these shafts was by the surface indications there?

A. The surface indications and the prospect on that No. 1 hole.

Q. What was the prsopect?

A. A pretty fair prospect, and that made us a little suspicious there when they didn't come to report to us what they had found.

Q. What did they find?

A. They had pretty fair prospects there.

Q. They had reported prospects?

A. Not the true ones.

Q. What did they report?

A. They reported that they got one pan about a cent or a cent and a half.

Q. What did you find?

A. I haven't panned it.

Q. You say you don't know what it was?

A. I have only got to take people's word for it that panned.

Q. You were suspicious simply because the property was valuable?

The COURT.—Counsel should not argue with the witness.

WILL A. BOSS, a witness produced on behalf of the defendants being duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. William A. Boss.

Q. Where do you live? A. Fairbanks Creek.

Q. How long have you lived there?

A. Since about the 1st of last October.

Q. What is your business? A. Mining.

Q. How long have you been engaged in mining?

A. About 21 years.

Q. How long in placer mining?

A. About 17 years.

Q. How long have you lived in the District of Alaska? A. About 17 years off and on.

Q. Are you acquainted with those claims No. 3 and 4 on Fairbanks that this law suit is about?

A. I am.

Q. You may state if you ever were on those claims and if so for what purpose.

A. I went to those claims about the 1st of last October—to No. 3 for the purpose of seeing if I wished to take a lay of No. 3. I went to Meehan when he was on the creek for a lay and asked him if he had any property he would give me a lay on.

Q. Well, you had a conversation which resulted in your going there?

A. Yes, sir. I went there and examined No. 3 to see

(Testimony of Will A. Boss.)

if I wished to take a lay. He told me that he understood it was going into litigation.

Q. What did you do?

A. I went there and borrowed a pan of Mr. Ashenfelter or the other man and went over to these dumps and examined the dumps and panned on 2 of the dumps.

Q. Take this map and this is supposed to represent hole No. 1 and this No. 2 and this No. 3—the upper and lower ends respectively of No. 3 and 4. You may state on what dumps you panned.

A. On No. 1. On the lower end of 4 and two on the upper end of 3.

Q. What examination did you make, if any, of the hole there?

A. I made an examination of the dump.

Q. To what extent?

A. To see what the gravel looked like—to see if there was any bedrock.

Q. What did you find?

A. I found considerable bedrock on the dump and gravel. I panned several pans and got what I should judge to be from 4 to 5¢ on the pan.

Q. What examination did you make of No. 2?

A. I examined that hole to see if I could find any bedrock and the amount of the gravel.

Q. What did you find?

A. There was no evidence of bedrock on the dump anywhere. I panned there and got some small light colors in the pan but nothing else.

(Testimony of Will A. Boss.)

Q. Did you go down into the hole?

A. I could not because there was water in it.

Q. I will ask you if it is not a usual thing to strike small light colors in holes of that kind before you strike pay. A. Yes, sir.

Q. Such as you found on No. 2?

(Objection as leading. Objection overruled.)

A. Yes, sir.

Q. What did you find on No. 3?

A. I found muck and a very small quantity of gravel on the top. The muck was scattered all around the hole. On one side gravel was scatterd over the muck. I took and panned and scraped the gravel to find out if there was any depth to it—in fact there was places where I could see the muck through the little gravel that there was there.

Q. Was that the extent of the examination?

A. No, sir—I examined these holes to see what state they were in—to see if there had been much caving.

Q. What condition were they in?

A. No. 1 was caved pretty badly—No. 2 was caved very badly, so badly that what little cribbing there had been had tipped over on the uphill side, so that it was on a level with the water. On the other side it was standing up. I went down to No. 3 and there was hardly any caving. There was no muck around the hole and the moss stood up pretty fresh. I could not see the cut edges of the muck. There was a spring on the property.

Q. Was there anything else in your examination at

(Testimony of Will A. Boss.)

that time that has any bearing on this controversy? I don't care to hear your general examination of the topography of the country.

A. Nothing that I can think of.

Q. When did you next visit the property, if you did visit it again? A. The next day.

Q. Who was with you? A. Nobody.

Q. What did you do that next day?

A. Almost the identical same thing except panning.

Q. When did you next visit the property?

A. I should judge it was about 10 days later.

Q. What was the occasion for your going?

A. I had taken a lay on a certain portion of the property?

Q. What did you do there?

A. I went there and started to build a cabin.

Q. Did you at any time have anything to do with the sinking of holes for Meehan and Larson and drifting?

A. About the 1st of October—I would not say exactly—no, the last part of October, I mean.

Q. Well, go on and tell the Court in your own way what you did at that time.

A. I was asked by Meehan to have a look at these holes as they were going down—and then he wanted me to get independent witnesses to examine the holes and testify if they were to bedrock.

Q. Did you do that? A. I did.

Q. Did you examine the holes yourself?

(Testimony of Will A. Boss.)

A. I did and made a bargain with the men who were sinking the holes for the use of the boiler.

Q. With reference to the shaft sunk to drift No. 2 you may tell the Court the extent of that work.

A. The shaft was sunk to a distance of 17 feet and 6 inches to the top of bedrock and the drift started to run underneath the old shaft that was sunk prior to that.

Q. No. 2?

A. Yes, sir—that drift was run 12 feet and a half.

Q. What were the dimensions of the drift?

A. The drift, I should judge, was about 3 feet high where it started from the shaft—possibly a little higher. I should judge 2 feet and a half at the end after the last points had been taken out and the dirt cleaned out, and probably 2 and one-half feet wide.

Q. How did it bear with reference to the old shaft?

A. A little bit to the left. In a distance of 12 feet I should judge it was about 15 or 18 inches.

Q. Where did it strike the old shaft?

A. Under the uphill end of the shaft.

Q. How much of the old shaft did it expose?

A. I don't know.

Q. What did you find?

A. A continuous streak of gravel.

Q. In place? A. It appeared in place to me.

Q. How far was it from the bottom of the drift where it struck the old shaft to the bedrock proper—how far above bedrock?

(Testimony of Will A. Boss.)

A. I don't know as we ever struck the old shaft.

Q. Didn't this drift strike the old shaft of No. 2?

A. Not to my knowledge.

Q. Where did it bear with reference to where the old shaft should have been?

A. I think it struck the uphill end of it.

Q. How far were you from bedrock?

A. I dug in bedrock with a pick.

Q. In the bottom of the drift? A. Yes, sir.

Q. What was the top and sides?

A. Gravel all over with one exception—one little streak of frozen sand there 4 or 5 inches wide.

Q. With reference to the hole and the drift as to No. 3 you may go and tell the Court what you did and what the result was.

A. I was there on the windlass and down in the hole while the shaft was being sunk, and on the windlass all the time the drift was being drive. The hole was sunk 23 feet and 3 inches to the top of bedrock, and the drift was driven 11 feet and 6 inches. We arrived at the length of this drift from using the rope and the plumb.

Q. How did this drift compare with reference to the old shaft?

A. As near as I could judge exactly to the center.

Q. How did you find that?

A. We had been using water out of the old shaft there for the boiler and we knew about where the center was. We had a stick across the top there and also a stick under that—one on top of the other.

(Testimony of Will A. Boss.)

Q. What was the result of the exposure made at any part of this drift with reference to the old shaft?

A. Well, we didn't see anything that looked like an old shaft there. It was what I supposed to be solid gravel.

Q. Hadn't been moved at all?

A. As far as I could tell it hadn't.

Q. What were the dimensions of this drift?

A. Eleven feet 6 inches long and between 2 feet and 2 feet 6 inches at the end and 2 feet 6 inches wide.

Q. How many were engaged with you in prosecuting this work?

A. In doing this work on No. 2 there was Angus McDougal and Mr. Rankin—on No. 3 O'Neil and Angus McDougal and Tom Davis.

Q. Three or four of you at work?

A. Yes, sir.

Cross-examination.

(By Mr. MILLER.)

Q. On No. 3 how far were the holes apart on the surface?

A. I never measured it but I should judge about 175 feet.

Q. I am speaking about hole No. 3—the shaft you sunk and the shaft that Nelson and Hensley sunk. Why did you drift 11 feet?

A. Because we wanted to be sure we had got over far enough.

(Testimony of Will A. Boss.)

Q. How large was this drift that you made?

A. About 2 feet 6 inches wide—or maybe 3 feet 6 inches—I will not be sure. That was where it left the drift and between 2 feet and 2 feet 6 inches at the end of the drift.

Q. You mean it was not as large at the end as it was at the starting point? A. No, sir.

Q. And gradually tapered towards the end?

A. Yes, sir.

Q. It was larger at the end or slightly larger.

A. At which end?

Q. At the end where you started from the shaft?

A. Yes, because it had sloughed from the points.

Q. In what direction did it go?

A. I have two means of telling. When the shaft was first sunk and I got the witnesses there to examine the shaft we put a stake or a pole across the center of the shaft that we sunk in the direction of the center of the other one. Later on in April I was there with Mr. Meehan I think it was and at that time we put sticks across in the same way and used a compass in the bottom of the shaft and on top.

Q. Did it vary to the left or to the right?

A. Not as near as I could tell.

Q. Could you tell? A. I think we could.

Q. Do you think you could? A. Yes, sir.

Q. Why do you think so?

A. Because we know the direction of the drift under-

(Testimony of Will A. Boss.)

neath and we knew the center of the hole approximately on top.

Q. Did you use the same precaution and the same means on hole No. 2?

A. We did. I would like to explain right here that I didn't have charge of sinking that shaft or running either drift. O'Neil had charge of that.

Q. But you stated that you varied?

A. I didn't state that I varied at all.

Q. That the shaft varied?

A. No, sir. I stated that the drift at hole No. 2 runs slightly to the left.

Q. You considered that a fair test of hole No. 3 as to whether it was on bedrock? A. Yes, sir, I do.

Q. Which hole did you sink first No. 2 or No. 3?

A. Both of them at the same time.

Q. Which one did you complete first? A. No. 2.

Q. And you struck the glacier there?

A. We didn't.

Q. You struck no ice?

A. Never saw any when I was in there.

Q. You have knowledge of it ever having been in there afterwards? A. I have.

Q. How long afterwards was it that you knew of this ice?

A. The holes was sunk about in October and I saw the ice in the bottom of the drift I think sometime early in April or the latter part of March.

(Testimony of Will A. Boss.)

Q. Could you ascertain or had you any means of knowing the exact distance your drift was from the supposed shaft of Nelson and Hensley?

A. Only as near as we could get.

Q. Did you go there under instructions not to make much effort to find out?

A. I went with instructions when the holes were down to get fair and impartial witnesses, that is the only instructions that I went there with.

Q. Did you enlarge that hole and widen it so there would be no chance of your missing it? A. No, sir.

Q. You were employed and paid by Nelson and Larson to assist in doing this work? A. No, sir.

Q. You had a lay from them yourself; on this very ground? A. Yes, sir.

Q. And hoped to continue that lay?

A. Yes, sir.

NATHAN ZIEMER, a witness produced on behalf of the defendants, being duly sworn, testified as follows?

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name?

A. Nathan Zeimer.

Q. Where do you live? A. Fairbanks.

Q. On Fairbanks Creek? A. Yes, sir.

Q. How long have you lived in the District of Alaska?

A. Since 1896.

(Testimony of Nathan Ziemer.)

Q. What is your business? A. Mining.

Q. Placer mining? A. Yes, sir.

Q. How long have you been a placer miner?

A. Ever since I am in Alaska.

Q. Since 1896? A. Yes, sir.

Q. You have been constantly engaged in it since you came here? A. Yes, sir.

Q. Are you acquainted with the property known as 3 and 4 Above on Fairbanks Creek? A. I am.

Q. I will show you this diagram—this place representing the holes No. 1, 2 and 3 on that property. I will ask you to state if you have ever made any examination of those holes. A. I have of that No. 3.

Q. That is all? A. Yes, sir.

Q. When was that?

A. About the date I would not be certain—I think it was about the last of May or the 1st of April.

Q. Somewhere about that time? A. Yes, sir.

Q. Of what year? A. 1904.

Q. You may tell the Court all that you did and found.

A. We went there in the shaft and measured the drift back that is about all.

Q. What did you find?

A. I measured about 11 feet and a half from the drift in length.

Q. Who was with you?

A. Mr. Meehan, Mr. McCormack and Mr. Larson.

Q. Jack McCormack.

A I don't know his given name.

(Testimony of Nathan Ziemer.)

Q. Well, tell the Court just what you did there.

A. Well, we went there to find out whether this drift ran under the other shaft and we lined it up with the other shaft.

Q. How?

A. We put a pole down the bottom and lined it up on top the same way.

Q. What did you find out?

A. Found out that they were in line.

Q. Did you make any examination of the drift with reference to that shaft to see what that showed as to bedrock?

A. I could not say whether that goes to bedrock or not. I didn't have no pick.

Q. What I mean is did you examine it with reference to whether it should strike the old shaft if it did strike it? A. Yes, sir.

Q. What did you find?

A. Nothing but gravel in place, I should judge.

Q. Any evidence of any disturbance?

A. No, sir.

Cross-examination.

(By Mr. MILLER.)

Q. You can state whether this was in April or May.

A. I wouldn't be positive whether it was in May or April.

Q. Was the hole and shaft entirely free from water?

A. There was ice in it.

(Testimony of Nathan Ziemer.)

Q. In hole No. 3?

A. In the old shaft—in the other one there was ice.

Q. How about the shaft that Meehan and Larson made?

A. There was a little snow in the bottom.

Q. And ice?

A. I didn't see none—the drift I know was clear.

Q. The water from the surface had dripped in to some extent? A. Not at the time I was there.

Q. You simply examined the old drift that had been made by Meehan and Larson? A. I did.

Q. What means other than you have stated did you use to ascertain whether this drift varied from the course of the Nelson and Hensley shaft?

A. With a couple of poles.

Q. Could you tell by the pole across the top of the hole alone, by standing in thes haft that Meehan and Larson made?

A. Yes, you could from the top yourself.

Q. How could you tell from the top the direction of the shaft? A. By the direction of the shaft.

Q. Did you have a candle there to light this shaft?

A. No, sir, it was light enough. You could plainly see there, there was snow down there. You could see the bottom of the shaft plainly.

Q. In the drift?

A. You could not see in the drift.

Q. Did you have a candle in it?

A. YYes, I had a candle in it when I was in the drift.

(Testimony of Nathan Ziemer.)

Q. When was that?

A. Why, the time I was there, of course.

Q. Who was working with you when the candle was in the drift? A. I had it in the drift myself.

Q. You could see around in the drift with it?

A. Yes, sir.

Q. You had the candle in there to inspect the character of the gravel and the bedrock, didn't you?

A. I wasn't caring for any bedrock.

Q. Well, then, to inspect the drift?

A. Yes, sir.

Q. Well, what way had you of ascertaining whether that drift varied to the left or to the right if it was dark in there?

A. It was not dark in the end of the shaft at the drift.

Q. Well, why did you have a candle in it?

A. I would not need any candle in the shaft.

Q. You had no candle there to tell whether it varied to the right or the left in the drift?

A. Why I told you I had a candle in the drift.

Q. But not to test the direction of it?

A. No. I don't think the candle would have tested the direction for me or done me any good in the drift. I couldn't look out on top out of the drift.

Q. But if you had had a candle in the end of the drift could you not have stood in the shaft at the bottom of it and taken the direction of that light and the direc-

(Testimony of Nathan Ziemer.)

tion of the drift by means of that candle as to any variance with the pole across the top?

A. No, sir, when I was in the bottom of the shaft I had light enough.

Q. How long was this old shaft Nelson and Hensley sunk there? How wide was it across the surface?

A. It was caved in a little then but I should judge possibly five feet.

Q. Through what portion of that 5 feet did this drift run?

A. It ran from the center as near as I could tell.

Q. It might have varied a foot or half a foot?

A. It might have varied a few inches.

Q. You think it went right through the center with mathematical precision? A. Yes, sir.

Q. If the bedrock had been struck in either corner of that 5-feet shaft of Nelson and Hensley you might have missed it even then, this being 5 feet wide and that one 2 or 3 feet wide, might you not? A. No, sir.

Q. Is it not true that in sinking a shaft to bedrock to prospect a claim they usually vary from 2 to 2½ feet in width and 4 or 5 feet in length and that when you strike bedrock you strike it in one end of that shaft? Isn't it usual to dig it out when you strike bedrock in one end if you don't go on and clean out the entire shaft on a level with the bedrock? In working in a drift like that you always have one end of the drift lower than the other and then reverse it?

(Testimony of Nathan Ziemer.)

A. Not necessarily.

Q. Isn't that usually the case?

A. Not that I know of.

Q. And that being the case you might have missed the bedrock?

A. The bedrock would have to have been about 4 feet higher than this drift was, if I did.

W. T. McLAREN, a witness produced on behalf of the defendants, being duly sworn testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. W. T. McLaren.

Q Where do you live?

A. I live out on Fairbanks Creek.

Q. How long have you lived there?

A. I have been there about 3 weeks.

Q. How long have you been in the District of Alaska?

A. About six years.

Q. What was your business? A. Mining.

Q. How long have you been a miner?

A. For the last six years.

Q. Ever since you have been in Alaska?

A. Mostly.

Q. You see this map which I hand you? This represents claims 3 and 4 Above on Fairbanks Creek. Are you familiar with that property? A. Yes, sir.

Q. Have you ever seen it? A. Yes, sir.

(Testimony of W. T. McLaren.)

Q. These (indicating) holes No. 1, 2 and 3. Have you ever seen these holes?

A. I panned on No. 1, looked at the other two, but I had no particular interest in it.

Q. What did you do with regard to Nos. 2 and 3 if anything? A. Nothing more than to look at them.

Q. What did you observe with reference to the dirt taken out?

A. Well, I don't think either one was to bedrock by the looks of the dirt.

Q. What about No. 2?

A. Nothing in particular except they were mostly small rocks and no bedrock.

Q. At what time was that? A. June, 1903.

Q. What did you observe about the dump of No. 3?

A. It was mostly all muck, apparently. I thought it was not much more than started. There was three or four buckets of slide rock or gravel thrown out there. That is all the gravel or rock that was thrown out, but I didn't pay much attention to it.

Q. You paid enough attention to observe the dumps in both places? A. Yes, sir.

Q. Did you see any indication of any bedrock in either hole?

A. None except the hole by the creek.

Q. You remember it? A. Yes, sir.

Cross-examination.

(By Mr. MILLER.)

Q. You didn't pay much attention?

(Testimony of W. T. McLaren.)

A. I noticed it on account of having property on the same creek, but none of it was developed at that time.

Q. From what attention you gave it and what you saw at the time you were impressed that they were not down to bedrock on either No. 2 or No. 3?

A. That was my opinion at that time.

Q. They looked something alike in that respect?

A. No, sir. No. 2 had considerable gravel or slide rock, or whatever you might call it, taken out, and No. 3 had very little out.

Q. If No. 2 had proved to have been to bedrock No. 3 might have proved also to have been to bedrock?

A. Well, it might certainly.

Redirect Examination.

(By Mr. CLAYPOOL.)

Q. Do you know what the general depth of gravel is on that part of the creek?

A. I don't know but very little about it.

THOMAS DAVIS, a witness produced on behalf of the defendants, being duly sworn, testifies as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. Tom Davis.

Q. Where do you live?

A. On Fairbanks Creek.

Q. How long have you lived there?

A. Over 12 months.

(Testimony of Thomas Davis.)

Q. How long have you been in the District of Alaska? A. Since 1900.

Q. What is your business? A. Miner.

Q. Placer miner? A. Yes, sir.

Q. How long have you been placer mining?

A. For about 20 years.

Q. Are you acquainted with the property known as No. 3 and 4 Above on Fairbanks Creek?

A. Yes, sir.

Q. This chart representing the property approximately and this hole being No. 1 on the end of No. 4 and this No. 2 and 3, I will ask you to tell if you have ever examined any of these shafts or holes? A. I have.

Q. Which one? A. This one—No. 3.

Q. When was this examination made?

A. About the latter part of October.

Q. Of what year? A. 1903.

Q. At whose request did you examine it?

A. Mr. Boss'.

Q. Have you any interest in this case?

A. No, sir.

Q. You may tell the Court what you found with reference to No. 3.

A. In going down the shaft we measured from the top to the bottom which was 23 feet and 3 inches.

(By the COURT.)

Q. That is in the new shaft? No. 3?

A. That shaft being to bedrock and taking the wind-

(Testimony of Thomas Davis.)

lass rope for a plumb-line the windlass rope to the end of the drift brought us to 11 feet 6 inches.

Q. Did you line the drift with reference to the old shaft? A. No, sir.

Q. What did you find in this drift with reference to any indication of bedrock or any other shaft?

A. There was bedrock all along the drift.

Q. At the bottom? A. Yes, sir.

Q. Any other disturbance?

A. Not as far as I could see.

Q. Gravel in place? A. Gravel in place.

(By Mr. MILLER.)

Q. What was the direction of this drift?

A. It ran as far as I could see directly from one hole to the other.

Q. What means have you of knowing?

A. By taking the timber of the shaft and the timber of the other.

Q. The same timber you placed there?

A. By going down this hole and taking notice of the timber here and the timber there—the squareness of the timber here and there.

Q. What timber are you talking about?

A. The timber on the new shaft.

Q. Placed there when completed? A. Yes, sir.

Q. By going down the shaft and taking that timber you were directed by that?

A. By the squareness of that timber towards the other shaft.

(Testimony of Thomas Davis.)

Q. At whose request did you go?

A. Mr. Boss'.

Q. In whose employ were you at that time?

A. I was employed by Mr. Boss.

Q. Boss and Meehan were on this particular claim?

A. Yes, sir.

Q. Are you in the employ of Boss now?

A. No, sir.

Q. Where have you been operating since that time?

A. I have been working my own property.

Q. Have you been in the employ of Mr. Meehan?

A. No, sir.

EDWARD CRANE, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. Ed Crane.

Q. Where do you live? A. I live on Fairbanks.

Q. What is your business? A. Mining.

Q. How long have you been a miner?

A. I have been there about a year and a half.

Q. How long have you been mining?

A. I have been mining about 15 years.

Q. Placer mining?

A. No, quartz mining before I came to this country.

Q. Placer mining since you came here?

A. Since 1898.

(Testimony of Edward Crane.)

Q. Are you acquainted with the property known as 3 and 4 Above on Fairbanks Creek? A. Yes, sir.

Q. Referring to this map I will ask you, did you ever examine either one of these holes No. 2 and No. 3?

A. I was over there last summer.

Q. What time last summer?

A. Last spring—a year ago this spring.

Q. About what time in the spring?

A. About the first of May, I guess.

Q. What did you do over there?

A. I didn't do anything there—just was over there.

Q. Did you observe either one of these places—take a look at them?

A. Shaft One there on the left limit—I could see bedrock on the dump, and at hole No. 2 there was quite a bit of gravel out but I didn't see no bedrock.

Q. Was there any indication of bedrock at all?

A. I didn't see none.

Q. What about 3?

A. I didn't see no indication of bedrock.

Q. How much gravel out on the dump of 3?

A. I couldn't say.

Q. Much or little?

A. Not a great deal—not nearly as much as on 2.

Cross-examination.

(By Mr. MILLER.)

Q. No bedrock on either one?

A. I didn't see none—no, sir.

(Testimony of Edward Crane.)

Q. Gravel varies does it not on different claims between the muck and the bedrock?

A. I guess it does, I don't know.

Q. It varies in different localities on the same claim?

A. Yes, there is different qualities—different kinds of gravel I guess.

Q. Your judgment was that there was no indication of gravel on either one of these claims?

A. No bedrock in sight that I seen.

Q. They both looked different on No. 1 as regards any indication of bedrock on the surface?

A. Yes, sir.

Q. Nos. 2 and 3 looked alike as regards bedrock on the surface? A. I didn't see nothing but gravel.

Redirect Examination.

(By Mr. CLAYPOOL.)

Q. Speaking of gravel varying, do you happen to know whether or not the gravel is deeper where No. 3 shaft is located than it is where No. 2 is located?

A. I don't know.

JOHN G. CROWLEY, a witness produced on behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. Jack Crowley.

A. Fairbanks Creek at present.

Q. Where do you live?

(Testimony of John G. Crowley.)

Q. How long have you lived in Alaska?

A. Since 1897.

Q. What is your business? A. Mining.

Q. Placer mining? A. Yes, sir.

Q. How long have you been placer mining?

A. About ten years.

Q. Are you acquainted with the property on Fairbanks creek known as Nos. 3 and 4 Above?

A. Yes, sir.

Q. This map representing the situation approximately, I will ask you if you have ever made any examination of that property?

A. I have been down Nos. 2 and 3.

Q. When did you go down Nos. 2 and 3?

A. Sometime in April of this year.

Q. 1904? A. Yes, sir.

Q. Who was with you?

A. Meehan and Boss I believe was there and some other gentleman—I don't know his name—and Mr. Larson was there.

Q. George Bow, do you know him?

A. I believe it was, I believe I heard someone call him that.

Q. Tell the Court what you did with No. 2?

A. They put a pole across the top and bottom and lined up the drift.

Q. How far are the holes apart—the old hole and the new one?

(Testimony of John G. Crowley.)

A. The old hole is probably 3 or 4 feet I should judge from the depression at the top.

Q. Proceed and tell what you did.

A. I told you we put a pole on top and one at the bottom and lined them up to get the distance.

Q. What did you ascertain?

A. I don't remember the distance.

Q. Did you line them up?

A. Yes, sir—the drift was bearing a little bit to the left.

Q. How much did it vary?

A. Probably 18 inches or 2 feet.

Q. Did you examine the drift? A. Yes, sir.

Q. What did you find?

A. On the creek side there was a small bunch of ice probably a foot or 18 inches from the bottom.

Q. On the creek side? A. Yes, sir.

Q. That would be on the right side?

A. Yes, sir.

Q. From your experience and your examination there what would you say as to whether or not that drift struck what would be the locality of the old shaft or not?

A. Well, there might be such a thing as that ice coming from water in the old shaft.

Q. Did the drift in your opinion run under or on what should have been the old shaft, if the old shaft had gone that far down?

(Testimony of John G. Crowley.)

A. A little to the side—it might have hit the very end of it. I could not say exactly as to where the old hole was sunk because the hole hadn't sloughed off square at the top.

Q. Do you know how far it was from underneath this piece of ice to bedrock?

A. I should judge about 18 inches or a foot.

Q. Did you find any evidence of disturbance or did it appear to be gravel in place?

A. Above that ice it seemed to be gravel in place.

Q. Anywhere else? A. All under the drift.

Q. Were there any evidences anywhere else in the drift of disturbances?

A. Only just that one spot of ice.

A. And above it appeared to be gravel in place?

A. Yes, sir.

Q. Did you examine hole No. 3 in company with the same gentlemen? A. Yes, sir.

Q. What was done?

A. They lined the hole up the same way, they had a compass with them.

Q. What did you find about that?

A. The old hole was exactly in front.

Q. And what about the drift?

A. In my own opinion the drift ran right square in under the other hole.

Q. Did you examine that drift?

A. It was gravel in place.

(Testimony of John G. Crowley.)

Q. Any evidence of disturbance at all?

A. No, sir.

Cross-examination.

(By Mr. MILLER.)

Q. How did you examine the drift?

A. With a candle and looking at it.

Q. How much did it vary if any?

A. I don't believe it varied any—in my opinion it didn't vary any.

Q. This is the first and only time you examined it?

A. Yes, sir.

Q. You examined No. 2 at the same time?

A. Yes, sir, the same day.

Q. You knew that No. 2 was on bedrock or claimed to be then?

A. I don't know that it has been bedrock—that is a pretty hard thing to know.

Q. How much did the drift in No. 2 vary to the left?

A. Eighteen inches or two feet.

Q. What is the depth of the drift on No. 3.

A. In the neighborhood of ten or twelve feet.

Q. You have no notes?

A. No, sir; I didn't take any notes.

Q. How large a surface was there of the old shaft—Nelson and Hensley shaft?

A. Where do you mean?

Q. How far from one edge of it to the other across the shaft to the top where it sloughed in?

A. It might have been five feet across it. You could

(Testimony of John G. Crowley.)

only judge from the depression of the snow. It is all guess work.

Q. Were you guided by the depression in the snow?

A. Yes, sir, and then there was some ends of cribbing that had been left for cribbing up the windlass.

Q. Didn't you think it caving in might have thrown that cribbing over? A. Not a great deal.

Q. Well, some?

A. Well, I suppose it could throw it out some.

Q. If that Nelson and Hensley shaft was five feet in diameter on the surface, might they not run a two or a two and one-half feet drift under it without striking it?

A. Which hole are you speaking about now?

Q. Nelson and Hensley's No. 3.

A. I don't believe that they could. If there was a drift running in under that hole it would certainly hit it.

Q. Isn't it usual in running a drift for one end of the drift to be lower than the other and for you to work at one end at a time?

A. You might work that way to get a face on, but a miner generally leaves the hole level at the bottom.

Q. And if you struck out at the end of the drift that you last worked in there could be bedrock at one end without bedrock over the entire surface? A. Yes, sir.

Q. And so that end of the drift being that way they might have passed it and still drift directly under the surface of the hole?

A. They could not do it very well—there is too much gravel in the roof to be any bedrock up there.

(Testimony of John G. Crowley.)

Q. But they might have done that?

A. I don't see how.

Q. Do you state to this Court that a two feet and a half drift would test the shaft that indicated five feet diameter at the top?

A. A five-foot shaft at the top has nothing to do with the shaft at the bottom.

Q. Why?

A. The top of a hole hain't got anything to do with the bedrock in the hole of course.

Q. If the shaft was carried down five feet?

A. That might be sloughed on top. I could not tell that. The ground was all frozen.

Redirect Examination.

(By Mr. CLAYPOOL.)

Q. Do you know the difference—if there is any difference—in the depth of gravel in this ground in holes Nos. 2 and 3. Did you observe that? What is the depth of the gravel for instance in hole No. 2?

A. Oh, there might be nine or ten feet of gravel.

Q. And how about No. 3?

A. There is more gravel underneath, I believe.

Q. How much more?

A. There might be a couple of feet more. I didn't examine it very closely.

MATTHEW MEEHAN, one of the defendants herein, being duly sworn, testifies as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. Matt Meehan.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. Where do you live? A. Fairbanks.

Q. How long have you lived in Alaska?

A. Seven years off and on.

Q. You are a placer miner? A. Yes, sir.

Q. You are acquainted with this property in dispute?

A. Yes, sir; I staked it.

Q. Both claims? A. Yes, sir.

Q. You are one of the parties to this agreement with Nelson? A. Yes, sir; I made the agreement.

Q. You may state when was the first time you made any examination, if you did make any, of the work claimed to have been done by Nelson and Hensley.

A. The 23d and 24th of April, 1903.

Q. Who was with you?

A. Frank Austen, but he didn't go to examine the ground.

Q. What did you do at that time?

A. Just examined the ground. There was snow on it and the evidence didn't show that the work had been half finished.

Q. What did you find in regard to No. 1?

(Testimony of Matthew Meehan.)

A. You couldn't tell nothing about it. The evidence around there—the wood that was burned and the size of the dump—didn't show on these other two holes that the work was completed.

Q. It didn't look to you as if it had been done?

A. No, sir.

Q. When did you next make an examination of it?

A. In July, 1903.

Q. What examination did you make then?

A. Went over and got poles to see what was there.

Q. Who was with you?

A. Tom Larson, my partner, and we cut poles and sunk them down to see how deep they were, and the look of the gravel showed that the holes weren't half completed.

Q. What did the gravel show as to No. 1?

A. Bedrock.

Q. And as to No. 2?

A. I don't think it was as near bedrock although it might have been closer to bedrock than we gave it credit for.

Q. Was there any indication of bedrock on the dump? A. No, sir.

Q. What do you say about No. 3?

A. Nothing but a pile of muck and a half a dozen buckets of gravel thrown over it and the moss growing over it.

Q. When were you next over there?

A. With Hendricks from the Lower Town.

(Testimony of Matthew Meehan.)

Q. When was that?

A. Late in July or the first of August.

Q. What happened then?

A. We just examined the ground and I wanted him to look at it so I would have him for a witness in case this ever came up.

Q. That is all that was done at that time?

A. We panned in the first hole on the first dump—Hendricks and I—and the others we didn't get nothing in.

Q. When did you next go there?

A. With Smallwood later on. Just the same thing. Examined the ground.

Q. Showed him the dump?

A. Just the same thing and showed him the surface.

Q. When did you go with reference to being down these holes to drift in Nos. 2 and 3?

A. Mr. Miller wanted to compromise the case last summer with me.

Q. About the time you went there to sink these shafts?

A. We sent men there in the winter and I was in town at the time.

Q. You didn't superintend that work yourself?

A. No, sir.

Q. You went there afterwards?

A. To examine the ground—this spring.

Q. Who was with you at that time?

(Testimony of Matthew Meehan.)

A. George Bow, Jack Crowley, Tom Larson there and Jack McCormack and Judge Roy.

Q. What did you do at that time?

A. We examined the ground.

Q. As to hole No. 2, what did you do?

A. Placed a stick above and below and lined them up. Took a candle back in the drift and found out that it ran off a little to the left, saw a little pigeon hole like that where the ice had just touched there, and a day or two afterward went and put a fire into that hole to find out if it was a glacier or if it was an old drift. Judge Roy was with me in the hole and we came to the conclusion that we had just struck the bottom of the old shaft that they had sunk about eighteen inches from bedrock.

Q. What test did you make to find that out?

A. Put a fire in, and went into it next day and cleaned it off.

Q. When was this? A. April, 1904.

Q. Did you find any evidence of any disturbance above bedrock?

A. No, sir; there weren't to bedrock.

Q. How near were they?

A. Pretty close—fifteen or eighteen inches.

Q. Was there anything in the gravel or dirt outside or was there any bedrock on the dump?

A. No, sir.

Q. When you and Roy were engaged in hole No. 2 how long did you stay there?

A. An hour or two maybe.

(Testimony of Matthew Meehan.)

Q. After the fire had thawed it?

A. Oh, maybe an hour—oh, maybe something like that.

Q. Was that all you did at that time?

A. That was all that was necessary.

Q. What did you and Roy ascertain as to the drift—as to whether it was in line with the hole?

A. It just ran along the edge of it. The new drift just ran alongside of the old shaft.

Q. What did you do about hole No. 3?

A. We did the same thing—lined it up above and below and put a candle in the back of the drift.

Q. What did you find?

A. Found out that it drifted right under the other shaft.

Q. Did you find any evidence of any disturbance there? A. Nothing but clear gravel.

Q. In place? A. Yes, certainly.

Q. Who was with you in No. 3?

A. I think Judge Roy was there and Billy Boss was on top and George Bow—he has gone out, we excused him, and Jack Crowley.

Q. Now, I only want you to testify facts and not your opinions. If I have omitted to ask you anything I want you to state it now.

A. I will state that there was between 10 and 12 feet of gravel in that hole. It was only 5 or 6 feet from the other one. Last summer I brought half a dozen men

(Testimony of Matthew Meehan.)

over here to examine that and there wasn't half a dozen buckets of gravel on the top of the dump.

Q. What is apparently the depth of the gravel in Nos. 2 and 3? A. Just a foot or two.

Q. Where were you when you made the offer to Hensley? A. Right in town here.

Q. Who was present when you were talking to those men?

A. That is a pretty hard question. I don't remember.

Q. What answer or request did they make to your offer?

A. They stated that the hole was to bedrock and they was not going to do any more. I volunteered to stand their expenses to do the work and let them examine it, last June when I was at the cabin at Gold Stream I told him that he had between two and three weeks to finish that work, and we would give him his total and he said he would go and look at it, so he went and came back and said he would let it go.

Cross-examination.

(By Mr. MILLER.)

Q. He claimed the holes were down?

A. Yes, sir; he claimed so.

Q. Then you would not want to go and put them down again?

A. If we thought them holes was down, you don't

(Testimony of Matthew Meehan.)

think we would be putting in a boiler there and drifting under them.

Q. Why did you sink these holes?

A. Because I seen that the holes weren't sunk. I was over there all last summer and seen it. I have sunk a few holes myself.

Q. You were only guessing at it.

A. I was not. I was using my experience as a miner.

Q. But there was nothing definite to make you think they were not? A. But we have proved it since.

Q. So you went to work to find evidence to build this case upon?

A. We sank those holes for that purpose.

Q. You sank those holes in October?

A. In October or November, I don't know just which. Sometime along about there.

Q. No suit had been commenced against you then?

A. Well, you said you was going to bring suit.

Q. How long did it take you to sink them?

A. Two or three weeks. Boys could tell you better than I could.

Q. You would have had plenty of time to do that after suit was brought.

A. Why, we wanted to go to work on the ground. We didn't want it to lie idle. That was the time to do it in the winter when you had a good chance to. If you will take any miner out on the ground now he will swear that there isn't half a dozen buckets of gravel, let alone 13 feet of gravel.

(Testimony of Matthew Meehan.)

Q. This gravel might have caved in—fallen back into the hole?

A. The hole was perfectly square—hadn't sloughed any. There was cribbing all around it.

Q. There was water in it?

A. Yes, sir—12 or 13 feet of water in it.

Q. Then this No. 3 was at least 14 feet deep?

A. Twelve or 13 feet; yes, sir.

Q. You admit this when you went out there in April? A. This was in July.

Q. You heard Larson's testimony that it had caved in? A. The cribbing was around it?

Q. Explain why No. 3 had caved in and not No. 2. Was not the formation the same?

A. No. 2 was further down in the bed of the creek and the chances were there was a little more water, but where No. 3 is it is 50 or 75 feet higher up. Outside of a little sloughing at the edges it was just as perfect as when it went in there and there was not more than half a dozen buckets of gravel on top of the muck.

Q. How did you find that the water was 13 feet deep in No. 3?

A. I had a tape line and I took a pole and stuck it down and worked it down as far as it would go.

Q. You say that in July there was 12 or 13 feet of water? A. Yes, sir.

Q. Had you any reason to believe that Nelson and Hensley hadn't gone to bedrock in that hole?

(Testimony of Matthew Meehan.)

A. Certain information. And you would believe it yourself if you saw it. Send your witnesses out now and prove it.

Q. This work of Nelson and Hensley was substantially the first work done on Fairbanks Creek?

A. Ziemer and Fallington was out there and so was McPike.

Q. They commenced about the same time that Nelson and Hensley?

A. Something about the same time.

Q. This property had no known value at that time?

A. Just wildcat the same as everything else.

Q. How was it in July when you went out there?

A. They had prospected on the side of Crane Gulch in April.

Q. And it was showing up pretty well?

A. It was not. A little prospect was found down on 6 Below. That was the only prospect that was found there till we went ourselves.

Q. Did you pan or shovel on No. 1? A. I did.

Q. Did Nelson and Hensley?

A. I think Hensley panned a pan.

Q. With what result?

A. Just a couple of fine colors—4 or 5¢, and we had a prospect below on 2.

Q. The property has constantly increased in value?

A. That don't make any material difference to it. We were entitled to it if they had fulfilled their contract. I asked them if they had put the holes down and

(Testimony of Matthew Meehan.)

they said they had. I said if they would go into town and get the papers out I would sign them, but they didn't think enough of the property to do so.

Q. And they never spoke to you again?

A. Neither one of them.

Q. Did they to Larson to your knowledge?

A. I don't know, to me they didn't.

Q. You never spoke to them after you left there?

A. I spoke to Hensley and he told me that the hole was down 17 feet.

Q. When was that you spoke to him?

A. Some time last summer.

Q. He was anxious to get the matter settled up with you?

A. No, it was you that was doing the anxious work.

Q. And you refused?

A. I told him they hadn't done the work and they weren't entitled to it.

Q. Who?

A. Hensley. You were the one that spoke to me first.

Q. I thought you said they didn't think enough of it to see you again? A. That was in March.

Q. And you saw them later?

A. I saw Hensley several times in the summer.

Q. You admit bedrock on No. 2? A. I do not.

Q. You have admitted it.

A. No, sir; I said they were within about 18 inches of it.

(Testimony of Matthew Meehan.)

Q. Who was with you when you went out there and put this fire in that you spoke of?

A. I think it was Judge Roy as lowered me down the hole.

Q. This was in April? A. Yes, sir.

Q. You didn't take the trouble to go and find anyone yourself to show them this fact?

A. Ziemer went down there later. We were looking to see if they had got to bedrock and they were within 12 or 15 or 18 inches of it.

By the COURT.—How much of an excavation did you make at that time?

A. Just made a little hole—the same as the port-hole of a ship, to let the fire get in there awhile. The Judge there did most of the digging and then we dug into the ice.

Q. You didn't dig it all out?

A. Just moved it back in the drift.

Q. You didn't dig all the bottom of that shaft out?

A. We just wanted to see what it was.

Q. How far in did you go?

A. Didn't go very far. You could see that the chances were it was water that dripped in there after they had got down.

Redirect Examination.

(By Mr. CLAYPOOL.)

Q. Mr. Ziemer has no interest in this case?

A. Not any in the world.

(Testimony of Matthew Meehan.)

Q. He just went out there at your request?

A. I just wanted to get some old miners that were known to be reliable. That is the reason I went for Bow and Ziemer. I wanted to get Morency too.

DAVID T. ROY, being duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAYPOOL.)

Q. What is your name? A. David T. Roy.

Q. You are an attorney by profession?

A. Yes, sir.

Q. How long have you been placer mining?

A. I think about two years.

Q. You have heard the testimony of Meehan, about Nos. 2, 3 and 4 on Fairbanks Creek? A. Yes, sir.

Q. I wish you would proceed in your own way and tell the Court just what you and Meehan did.

A. Meehan wanted to put a fire on the right-hand side of the drift in hole No. 2. This drift is in about 12 feet. About 3 feet from the end of the drift he put the fire. He said he thought he saw the dripping of water of some kind and then he came to me and asked me if I would help to clean that fire out. I then climbed down on the right and went in there and moved the dirt that had fallen down by reason of the fire, and found a piece of ice about 8 feet long and 3 or 5 inches high. We dug through that portion of the ice and came to the solid gravel back behind there in place and then we stopped.

(Testimony of David T. Roy.)

Cross-examination.

(By Mr. MILLER.)

Q. When was that?

A. I should judge it to be about the first of April this year.

Q. Who was present? A. Matt Meehan.

Q. Who else? A. That is all.

Q. You didn't get other witnesses?

A. I don't know what he did.

Q. You had a lay from Meehan on this particular claim? A. Yes, sir.

Q. You are in the employ of McMahon as his attorney now?

A. At this particular time; yes, sir.

Q. How much gold was taken out of that claim last winter? A. I don't know.

Q. Well, how much did you take out?

A. That is immaterial and irrelevant and a matter on which I do not care to answer.

The COURT.—Not if it refers to this particular claim.

The WITNESS.—I cannot answer that because the boys are still taking some out.

Q. State of your own knowledge how much has been taken out. A. I don't know.

Q. How much have you taken out?

A. I don't know. The boys are still cleaning up.

Q. Have you taken out $1000.00?

A. Myself no, I have not.

Defendants rest.

THOMAS LARSON, called on behalf of the plaintiffs in rebuttal, testified as follows:

(By Mr. MILLER.)

Q. How many lays have you had on No. 3 since this work was done by Nelson and Hensley?

(Objection as not proper rebuttal; objection sustained; exception.)

Q. State how many laymen you had on No. 3 last winter? A. Do you mean on all of 3?

Q. Yes.

The COURT.—You want to ascertain how much gold was taken up to that date?

Mr. MILLER.—Yes, sir.

The WITNESS.—About $9,000.00; perhaps a little better.

Q. Does that include all that has been taken out or all that has been washed out?

A. All that has been washed up.

Q. How much is there in the dump if any, not washed up as yet—are the dumps all washed up to date?

A. I would call them washed up.

Q. You have taken out somewhere between $9,000 and $10,000? A. Yes, sir.

Q. Is that net to you or the total?

A. That is the total.

Q. How much of that goes to you as royalty?

A. One-third.

Q. Who were your laymen?

(Testimony of W. H. Woolridge.)

(Objection as immaterial; objection sustained.)

Q. Are there still men on No. 3? A. Yes, sir.

Q. Are you in a position to state definitely how much has been taken out? You kept a record of these matters? A. Yes, sir.

W. H. WOOLRIDGE, recalled in rebuttal, testified as follows:

(By Mr. MILLER.)

Q. State to what extent you have examined the drift of Meehan and Larson on No. 2, as to whether they went to bedrock or into bedrock and state what the showing is?

(Objection as not proper rebuttal and as repetition.)

The COURT.—What is the purpose of this?

Mr. MILLER.—I want to show that they went below bedrock in their drift.

(Objection overruled.)

A. Did I understand you—you are speaking of the drift running into the old hole, No. 2, about which I made a statement heretofore that this drift running under the hole No. 2 of Hensley and Nelson was beneath the surface of the bedrock and that this block of ice was in a break of the bedrock. It was not a simple pot hole but the edge of the bedrock as it came along was dug out and there was an indentation and then we could follow the line and the indentation of the bedrock was directly along this block of ice. I mentioned that particularly to Steelsmith when we were in the hole.

NORMAN McKAY, recalled in rebuttal, testified as follows:

(By Mr. MILLER.)

Q. State what you know with reference to this shaft of Meehan and Larson at hole No. 2 and the drift being to bedrock or below bedrock.

A. The drift was running, I should judge, four inches into the bedrock and there was three or four inches of gravel from the top of the bedrock to the bottom of the ice and I should judge seven or eight inches from the bottom of the drift to the bottom of the ice.

WILLIAM BOSS, recalled in rebuttal, testified as follows:

(By Mr. CLAYPOOL.)

Q. At the time you examined this piece of ice you can tell the Court what condition it was in.

A. When I went down there was at least a foot of gravel under that ice. The bedrock was showing very plainly along here and the ice came out a very short distance into the open drift and about a foot of solid gravel under it.

Q. What was the character of the bedrock?

A. Rotten mica schist.

Q. Rough or broken?

A. Absolutely perfectly smooth.

In the United States District Court, in and for the District of Alaska, Third Division.

O. A. NELSON and G. N. HENSLEY,
Plaintiffs,

vs.

M. MEEHAN and T. LARSON,
Defendants.

Stipulation.

It appearing that Michael McMahon claims an interest in the placer mining claim described in plaintiff's complaint adverse to the claims of the plaintiffs, it is therefore stipulated, that said Court make an order bringing in and making said Michael McMahon a party defendant in said action without prejudice to any of the proceedings already had in this action, and that plaintiffs may have leave to amend their complaint herein, and the said McMahon hereby waives summons and makes appearance herein.

Dated May 30th, 1904.

H. J. MILLER,
Attorney for Plaintiffs.

DAVID T. ROY,
Attorney for Michael McMahon.

CLAYPOOL & COWLES,
Attorneys for Meehan & Larson.

Filed in the U. S. Court, District of Alaska, 3d Division, June 16, 1904. A. R. Heilig, Clerk. By ———— ————, Deputy.

In the United States District Court, in and for the District of Alaska, Third Division.

O. A. NELSON and G. N. HENSLEY, Plaintiffs,
vs.
M. MEEHAN and T. LARSON, Defendants. } 127.

Order Making Michael McMahon a Party Defendant.

On reading and filing the stipulation of H. J. Miller, attorney for plaintiffs and David T. Roy, attorney for Michael McMahon, and Claypool & Cowles, attorneys for defendants, M. Meehan and T. Larson, and said stipulation providing among other things that an order of this Court be made making said Michael McMahon a party defendant, and that said McMahon therein waives summons and makes appearance, and on motion for plaintiffs, and there being no opposition:

It is ordered that said Michael McMahon be made a party defendant herein, and that the complaint be amended accordingly; and that said Michael McMahon make appearance herein within three days from the entry of this order and that plaintiffs be allowed to file a supplemental complaint herein, setting up plaintiffs' claim for an accounting and share of the royalties and

profits of the premises described in said complaint, and that a copy of the complaint as amended be served upon said David T. Roy, attorney for McMahon, and Claypool and Cowles, attorneys for the above-named defendants, and that said cause thereupon proceed as if said Michael McMahon had been originally a party defendant therein.

Dated the fourteenth day of June, 1904.

JAMES WICKERSHAM,
Judge of Said Court.

Entered June 16, 1904, Journal 3, p. 71.

In the United States District Court, for the District of Alaska, Third Division.

NELSON and HENSLEY,
Plaintiffs,
vs.
MEEHAN, LARSON and MacMAHON,
Defendants.
127.

Order Appointing Referee.

This cause having come to issue and trial before the Court, and the Court having heard the testimony of all the witnesses offered on the part of both plaintiffs and defendants, and being fully advised in relation to all the matters in controversy as shown by the pleadings and the evidence of the parties, now desires more accurate information in relation to the location of the shafts sunk by Nelson and Hensley on the upper end of the mining claim number Three Above Discovery on Fairbanks

Creek in controversy; and the Court deeming it important to ascertain accurately whether or not the shafts so sunk by Nlson and Hensley and called Numbers Two and Three in the evidence in this case, were sunk to bedrock; and whether or not the drifts running from the new shafts Numbers Two and Threee alongside the old bore to the left and missed the old shafts or actually went under them; and all parties to the litigation in open court consenting thereto—

It is hereby ordered that R. A. Jackson, a duly qualified and expert surveyor, be, and he is hereby, appointed a referee with instructions from the Court to make an accurate survey of the said old shafts Numbers Two and Three and the said new shafts Numbers Two and Three and the drifts running therefrom toward or underneath the old shafts on said mining claim Number Three in litigation, for the purpose of determining accurately their position with regard to each other; and he is instructed to make a careful, detailed and technical survey for the purpose of ascertaining such facts and then to make a map or maps thereof, showing the exact situation, and to make his report thereon to this Court in writing as soon as he can reasonably do so. His costs for doing such work shall be charged as costs in the case and paid by the losing party, and neither party hereto shall pay him any sum whatever for any part or portion

of such labor or work, or anything in connection therewith, except upon the order of the Court.

Dated at Fairbanks, Alaska, this nineteenth day of July, 1904.

JAMES WICKERSHAM,

District Judge.

Entered July 18, 1904, in Journal 3, p. 178.

United States District Court, District of Alaska, Third Division.

O. A. NELSON et al., Plaintiffs,

vs. } 127.

M. MEEHAN, et al., Defendants.

Additional Order.

It is ordered by the Court, plaintiff and defendant consenting thereto, that R. A. Jackson be allowed to enter upon placer mining claim Number Three Above Discovery on Fairbanks Creek, Alaska, to make survey and measurements of shaft and drift near right limit of the upper end of said claim, and known as shaft and drift Number Three with a view of establishing the direction of said drift with reference to the old shaft of plantiffs, and to widen said drift at a point at or near the old shaft of plaintiffs with a view of establishing the depth of shaft sunk by plaintiffs under their contract on which

this action is based, and as to whether the same extends to bedrock, and that one of plaintiffs and one of defendants each shall be allowed to be present and view said work, and that the said Jackson shall do said work and cause the same to be done by disinterested persons other than plaintiffs and defendants and their employees.

That when the said work is completed as provided by this order the same shall be reported to this Court and the parties examined thereto for the purposes of this this action.

Dated July 21st, 1904.

JAMES WICKERSHAM,
Judge of Said Court.

Entered July 21, 1904, Jour. 3, page 181.

In the United States District Court, for the District of Alaska, Third Division.

NELSON and HENSLEY,
Plaintiffs,
vs.
MEEHAN, LARSON and McMAHON,
Defendants
} 127.

Report of Referee.

In compliance with the order of the Court under date 19 July, 1904, I proceeded to No. 3 Above on Fairbanks Creek. On arrival I had new shaft No. 3 and tunnel cleaned. I thereupon made a survey of the tunnel and

found that it would tap the Nelson shaft No. 3 nine-tenths of a foot from the south end of said shaft, crossing the east side line and penetrating under the shaft one and one-tenths foot, at an elevation of two and two-tenths feet from bedrock.

The expense of cleaning new shaft No. 3 and tunnel being large, (I thought it best to find out the wishes of the Court in regard to carrying out the expressed order of the Court, and stopped proceedings for that purpose. I respectfully submit plat as per above survey.

Fairbanks, Alaska, 1 August, 1904.

R. A. JACKSON,

Referee.

Filed Aug. 2, 1904. A. R. Heilig, Clerk.

Third

6.00

50.00

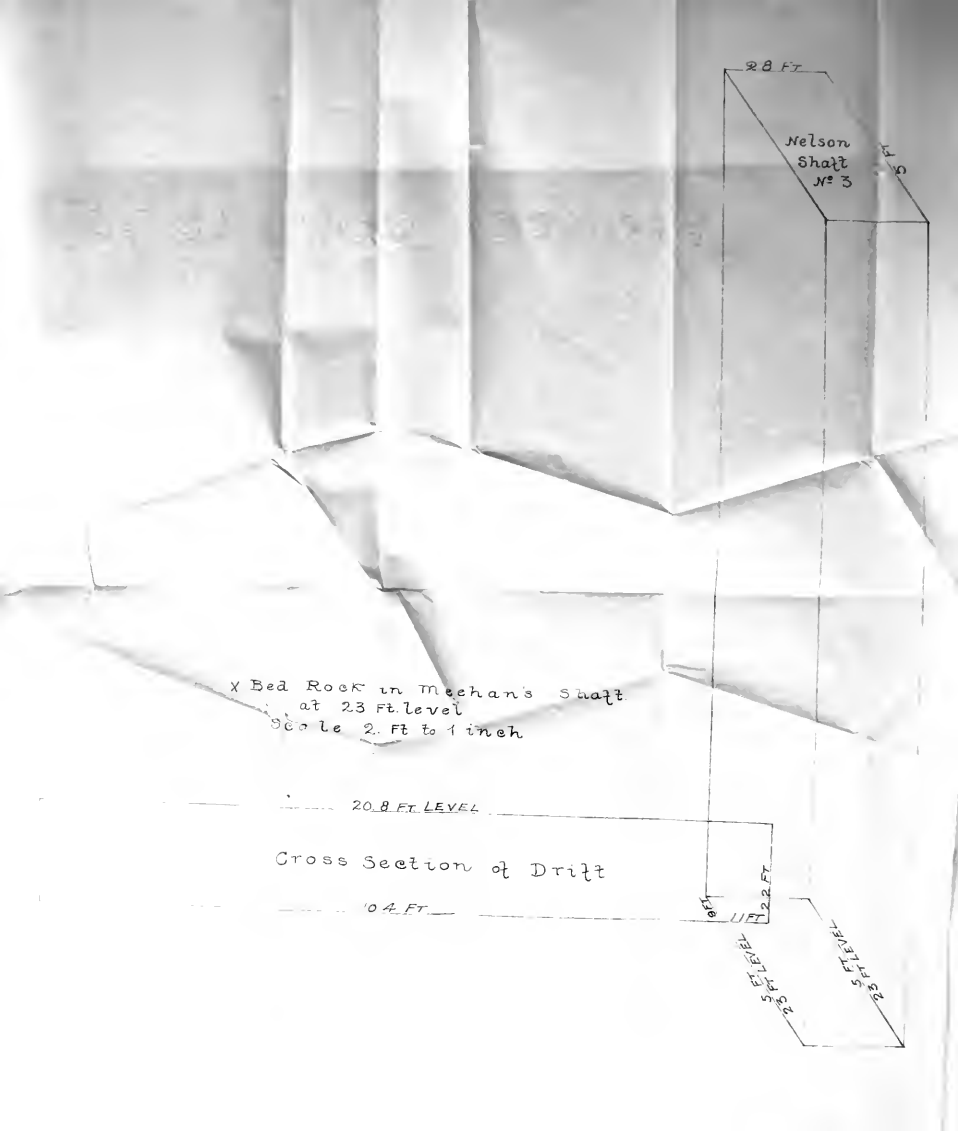
11.00

ing

hours at one

bill rendered and

ished..... 108.00


28 Ft
Nelson
Shaft
№ 3
X Bed Rock in Mechan's Shaft
at 23 Ft level
Scale 2. Ft to 1 inch
20.8 FT LEVEL
Cross Section of Drift
10.4 FT
8 FT
11 FT
22 FT
23 FEET
23 FEET

United States District Court, District of Alaska, Third Division.

O. A. NELSON and G. N. HENSLEY,
Plaintiffs,

vs.

MATT MEEHAN, T. LARSON and MICHAEL McMAHON,
Defendants.

Costs and Disbursements.

Disbursements.

Marshal's fees to service of summons..... 6.00

Clerk's fees

R. Jackson's fees and expenses of making survey and measurements of shaft and drift No. Three on claim in controversy and in removing water and caved in dirt from said shaft preparatory to and to enable said survey to be made, as follows to wit:

Services of R. A. Jackson.... .....$150.00

Roadhouse expenses of said Jackson..... 11.00

Services and labor of Dell Bishop, John T. White, William Buss and Charles Mack amounting in all to one hundred and eight hours at one dollar per hour as per bill rendered and vouchers furnished... .... 108.00

Witness' fees, to wit: Norman McKay, one day and twenty-five miles, traveled to attend.....	11.50
W. H. Woolridge, one day.....	4.00
John McPike, one day and mileage from Fairbanks creek.....	11.50
G. L. Steelsmith, one day and mileage from Fairbanks creek.....	11.50
Austin Gibbs, one day and mileage from Fairbanks creek.....	11.50
William Crab, one day and mileage from Chena	7.00
Geo. Ashenfelter, one day and mileage from Fairbanks creek.....	11.50
Gus Alm, one day and mileage from Fairbanks creek.....	11.50
Ben Chase, one day.....	4.00
Stenographer.....	
	$359.00
Clerk's Fees.....	
Total.....	

United States of America,
District of Alaska. } ss.

H. J. Miller, being duly sworn, says: I am plaintiffs' attorney, and as such am informed relative to the above disbursements. That, to the best of this affiant's knowledge and belief, the items in the above memorandum contained are correct, and that said costs and disbursements have been necessarily expended in the said action.

H. J. MILLER.

Filed in the U. S. Court, District of Alaska, 3d Division, Aug. 20, 1904. A. R. Heilig, Clerk. By ———— ————, Deputy.

In the United States District Court, for the District of Alaska, Third Division.

O. A. NELSON and G. N. HENSLEY,
Plaintiffs,

vs.

MATT MEEHAN, THOMAS LARSON and MICHEL McMAHON,
Defendants.

Order Settling Bill of Exceptions.

Now, on this 31st day of August, 1904, come the defendants Matt Meehan and Thomas Larson, by their attorneys Messrs. Claypool, Stevens & Cowles, and O. A. Nelson and G. M. Hensley, by their attorney H. J. Miller, Esq., and the defendant Michael McMahon also comes by his attorney David T. Roy, Esq., and the said defendants Matt Meehan and Thomas Larson present their statement of facts and bill of exceptions for settlement herein on their appeal to the United States Circuit Court of Appeals for the Ninth Circuit; which bill of exceptions consists of the foregoing typewritten pages of the proceedings and testimony of witnesses given by the respective parties at the trial of said cause in this court, as well as the stipulation making Michael McMahon a party defendant to said action, and the order of court making the said Michael Mc-

Mahon a defendant in said cause and the voluntary order of court appointing R. A. Jackson, Esq., to secure further evidence in said cause, and the voluntary additional order of said court granting authority to said R. A. Jackson, Esq., to conduct an examination of the premises in dispute in said action, and the report of said R. A. Jackson, Esq., as referee under said orders of said court, together with the plat of said Jackson filed August 2d, 1904, with the report of the said Jackson; and the cost-bill in said cause filed with the clerk thereof; all attached hereto. And there being no objections thereto upon the part of the said plaintiffs and no objections made by the said Michael McMahon, and no amendments proposed thereto, and the said proceedings, evidence of witnesses, stipulation, orders, report, plat and cost-bills attached hereto, as aforesaid, being and constituting all of the evidence and proceedings in said cause, not of record; and inasmuch as the same does not appear of record in said action, and is correct in all respects and is hereby approved, allowed and settled, the same and the whole thereof is hereby made a part of the record herein.

Done in the same term of court as the trial thereof, and within the time allowed by order of said Court and by the same judge who presided at the trial thereof this 31st day of August, 1904.

JAMES WICKERSHAM,
Judge of Said Court.

O. K.—By D. T. ROY, Atty. for Mr. McMahon.

United States District Court, District of Alaska, Third Division.

O. A. NELSON and G. N. HENSLEY,
Plaintiffs,

vs.

M. MEEHAN, T. LARSON and MICHAEL McMAHON,
Defendants.

127

Findings of Fact.

This cause having been called regularly for trial before the court, H. J. Miller appeared as attorney for plaintiffs and Claypool & Cowles appeared at attorneys for defendants, Mat Meehan and T. Larson, and N. V. Harlan and David Roy, appeared as attorneys for defendant Michael McMahon. And the Court having heard the proofs of the respective parties, and considered the same, and the records and the papers in the cause, and the cause having been submitted to the Court for its decision without argument, and the Court having considered the same now finds the following facts:

1. That at the time of the commencement of this suit defendants owned and were possessed of that certain placer mining claim described in plaintiff's complaint, and containing 20 acres.

2. That on the sixth day of February, 1903, plaintiffs and defendants, M. Meehan and T. Larson, entered into

the agreement mentioned in said complaint and that at the time said agreement was made defendants owned and were possessed of the placer mining claim therein described, to wit, placer mining claim Number Three Above Discovery on Fairbanks Creek, Alaska.

3. That immediately thereafter plaintiffs commenced the performance of their part of said agreement, and continued until they completed same, in putting three holes to bedrock on said claim as therein provided, within the time and at the places therein designated, and that plaintiffs performed all the conditions of their agreements with the defendants, to be performed under its terms.

4. That immediately after the completion of said agreement, plaintiffs notified defendants M. Meehan and T. Larson, of the completion of same, and demanded of defendants, prior to the commencement of this action, a conveyance of said one-half interest in said mining claim, which demand was by the defendants never complied with.

5. That the defendants after the completion of the sinking of three holes by plaintiffs under their contract, and without inspecting said work, promised plaintiffs to make said conveyance; but delayed, neglected and failed to make the same and to examine and inspect said work until it was impossible so to do by reason of said holes having caved in and filled with water; when defendants refused to convey said interests in said claim to said plaintiffs upon their request so to

do, and which request was never by the defendants complied with.

6. That at the times hereinbefore set forth the defendants were and ever since have been, in possession of said mining claim.

7. That during said time defendants have worked and mined said claim through laymen, and have collected and received all the royalties, rents and profits of the said described premises amounting in the whole to three thousand dollars.

8. That prior to the filing of the amended and supplemental complaint herein plaintiffs demanded of the defendants an accounting of said royalties and of the payment to them of their share of the same, and that defendants refused to make said accounting and to make payment to plaintiffs of their share of the same.

As conclusions of law from the foregoing facts, the Court finds:

1. That plaintiffs performed all of the conditions of their agreement with the defendants to be by them performed.

2. That plaintiffs are entitled to prevail herein and to a decree of this Court decreeing a specific performance of said agreement, and to a conveyance of one-half of the claim described herein.

3. That defendants are estopped from questioning plaintiffs' rights to said premises under said agreement by reason of the facts stated in the fifth paragraph of the findings of fact herein.

4. That the plaintiffs are entitled to a judgment and decree for one-half of the rents and royalties collected and received by the defendants, M. Meehan and T. Larson, and for their costs and disbursements in this behalf expended.

JAMES WICKERSHAM,
Judge of Said Court.

Filed in the U. S. Court, District of Alaska, 3d Division, Aug. 17, 1904. A. R. Heilig, Clerk. By ———— ————, Deputy.

In the United States District Court for the District of Alaska, Third Division.

O. A. NELSON and G. N. HENSLEY,
Plaintiffs,
vs.
MATT MEEHAN and THOMAS LARSON,
Defendants.
127.

Motion for New Trial.

Come now the defendants above named, by their attorneys, and move the Court for a new trial of the issues in the above cause for the reasons:

1. Insufficiency of the evidence to justify the decision, and that it is against law and equity.

2. Error in law occurring at the trial and excepted to by the defendants during the trial of said cause.

CLAYPOOL, STEVENS & COWLES,
Attorneys for Defendants.

Service by receipt of a copy of the above admitted this 3d day of August, 1904.

H. J. MILLER,
Attorney for Plaints.

Filed in the U. S. Court, District of Alaska, 3d Division, Aug. 17, 1904. A. R. Heilig, Clerk. By ———— ————, Deputy.

United States District Court, Third Division, District of Alaska.

NELSON and HENSLEY,
vs.
MEEHAN and LARSON. } No. 127.

Order Overruling Motion for New Trial.

And now, to wit, August 17, 1904, this action coming on to be heard upon the motion of the defendants for a new trial herein, the Court having heard the arguments of counsel for both parties, overrules said motion. To which ruling defendants except and an exception is allowed.

Entered August 17, 1904, in Journal 3, page 242.

United States District Court, District of Alaska, Third Division.

O. A. NELSON and N. G. HENSLEY, Plaintiffs

vs.

M. MEEHAN, T. LARSON and MICHAEL McMAHON, Defendants

127.

Decree in Action for Specific Performance of Contract.

This cause came on regularly for trial and was tried by the Court on the eighteenth day of July, 1904, upon the amended complaint of the plaintiffs above named; and the answers of the defendants above named; witnesses were examined on the part of both plaintiff and defendants, and upon the proof taken in said action, the cause was submitted to the Court for consideration and decision, and after due deliberation thereon the Court delivered its findings of fact and conclusions of law, and the same having been duly rendered by the Court, and being now on file in this cause, it is ordered that judgment be entered in accordance therewith.

It is now, therefore, hereby ordered, adjudged and decreed that the plaintiffs have judgment, as prayed for in their complaint herein, against the defendants, and each of them and all persons claiming or to claim said

premises or any part thereof, through or under said defendants are hereby adjudged to be invalid and groundless; and that the plaintiffs are hereby declared and adjudged to be the true and lawful owners of a one-half interest of the placer mining claim described in the complaint, and hereinafter described and that said defendants be adjudged to convey said interest in said placer mining claim to the plaintiffs and to execute a good and sufficient deed therefor to them of said property, and for judgment for one-half of the royalties and rents collected and received by said defendants from said desscribed premises, said one-half of the said rents amounting to the sum of fifteen hundred dollars.

Said placer mining claim is described as follows, to wit: Placer mining claim number Three Above Discovery on Fairbanks Creek, Fairbanks Mining District, District of Alaska.

And it is hereby further ordered and adjudged that the plaintiffs do have and recover their costs and disbursements taxed at $359.00 dollars, against the defendants, M. Meehan and T. Larson.

Done in open court this 17th day of August, 1904.

JAMES WICKERSHAM,
Judge of Said Court.

Entered Aug. 17, 1904, in Journal 3, p. 243.

In the United States District Court for the District of Alaska, Third Division.

O. A. NELSON and G. M. HENSLEY,
Plaintiffs

vs.

MATT MEEHAN, THOMAS LARSON and MICHAEL McMAHON,
Defendants.

Assignment of Errors.

Comes now the defendants Matt Meehan and Thomas Larson and file the following assignment of errors upon which they rely:

I.

That the Court erred in its findings of fact set forth in paragraph III thereof, in finding as follows:

"That immediately thereafter (referring to the contract made between the parties and admitted in the proceedings) plaintiffs commenced the performance of their part of said agreement, and continued until they completed same, in putting three holes to bedrock on said claim, as therein provided, within the time and at the places therein designated, and that plaintiffs performed all the conditions of their agreement with the defendants, to be performed under its terms."

II.

That the Court erred in its findings, to wit:

"That immediately after the completion of said agreement, plaintiffs notified defendants M. Meehan and T. Larson, of the completion of same, and demanded of defendants prior to the commencement of this action, a conveyance of said one-half interest in said mining claim, which demand was by the defendant never complied with."

—as set forth in paragraph IV of said findings of fact.

III.

That the Court erred in its finding as follows:

"That the defendants after the completion of the sinking of three holes by plaintiffs, under their contract, and without inspecting said work, promised plaintiffs to make said conveyance; but delayed, neglected and failed to make the same and to examine and inspect said work until it was impossible so to do by reason of said holes having caved in and filled with water, when defendants refused to convey said interests in said claim to said plaintiffs upon their request so to do, and which request was never by the defendants complied with."

—as set forth in paragraph V of said findings of fact.

IV.

That the Court erred in finding as follows:

"That during said time defendants have worked and mined said claim through laymen, and have collected and received all the royalties, rents and profits of the

said described premises amounting in the whole to $3,000.00."

—as set forth in paragraph VII of said findings of fact.

V.

That the Court erred in its conclusions of law:

"That plaintiffs performed all the conditions of their agreement with the defendants to be by them performed."

—as set forth in paragraph I of said conclusions of law.

VI.

That the Court erred in its finding as a conclusion of law:

"That plaintiffs are entitled to prevail herein and to a decree of this court decreeing a specific performance of said agreement, and to a conveyance of one-half of the claim described herein."

—as set forth in paragraph II of said conclusions of law.

VII.

That the Court erred in finding, as a conclusion of law:

"That defendants are estopped from questioning plaintiffs' rights to said premises under said agreement by reason of the facts stated in the 5th paragraph of the findings of fact herein."

—as set forth in paragraph III of said conclusions of law.

VIII.

That the Court erred in its conclusion of law:

"That the plaintiffs are entitled to a judgment and decree for one-half of the rents and royalties collected and received by the defendants, M. Meehan and Thomas Larson, and for their costs and disbursements in this behalf expended."

—as set forth in paragraph IV of said conclusions of law.

IX.

That the Court erred in overruling defendants' motion for a new trial in said cause.

X.

That the Court erred in signing and entering the decree herein for the reason that the same was against the law and the evidence and that the facts proven by the evidence produced at the trial of said cause was not sufficient to support said decree.

XI.

That the Court erred in not comprehending or not considering the report of A. R. Jackson, referee in said cause.

Wherefore the defendants Matt Meehan and Thomas Larson pray that the judgment or decree of said Court be reversed, set aside or modified, and for such other relief as they are entitled to receive.

CLAYPOOL, STEVENS & COWLES,

Attorneys for Defendants, Matt Meehan and Thomas Larson.

Filed in the U. S. Court, District of Alaska, 3d Division, Aug. 31, 1904. A. R. Heilig, Clerk. By ———— ————, Deputy.

In the United States District Court, for the District of Alaska, Third Division.

O. A. NELSON and G. M. HENSLEY,
Plaintiffs,
vs.
MATT MEEHAN, THOMAS LARSON and MICHAEL McMAHON,
Defendants.

Bond on Appeal.

Know all men by these presents that we Matt Meehan and Thomas Larson, of the town of Fairbanks, District of Alaska, as principals and D. G. McCarty and Al Hilby, of the same place, as sureties, are held and firmly bound unto O. A. Nelson, G. M. Hensley and Michael McMahon in the full and just sum of five thousand dollars ($5,000.00) to be paid to the said O. A. Nelson, G. M. Hensley and Michael McMahon, or to either or any of them, their attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of August, A. D. 1904.

Whereas, lately, at a term of the United States District Court for the District of Alaska, Third Division, in a suit pending in said court between the said O. A. Nelson and G. M. Hensley as plaintiffs and the said Matt Meehan, Thomas Larson and Michael McMahon as defendants, wherein the said plaintiffs sued for the specific performance of a contract providing for a conveyance of a one-half interest in that certain placer mining claim situate in the Fairbanks Recording District, District of Alaska, and known as Claim Number Three Above Discovery on Fairbanks creek; a decree was rendered against the said defendants in said action, and the said Matt Meehan and Thomas Larson are about to obtain from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the said decree and final judgment in the aforesaid suit, and a citation directed to said O. A. Nelson and G. M. Hensley, plaintiffs above named, and the said Michael McMahon, as defendant, is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now the condition of the obligation is such that if the said Matt Meehan and Thomas Larson shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them, if they fail to make their plea good, and shall in all respects abide and perform the orders and judgments of the appellate court upon their said appeal, then the

above obligation is to be void; otherwise to remain in full force and virtue.

MATT MEEHAN. [Seal]
THOMAS LARSON. [Seal]
D. G. McCARTY. [Seal]
AL HILBY. [Seal]

United States of America,
District of Alaska. } ss.

D. G. McCarty and Al Hilby, the persons named in and who subscribed the above and foregoing undertaking as sureties thereto, being first severally and duly sworn, each for himself says:

That he is a resident within the District of Alaska; that he is not a counsellor, attorney at law, marshal, clerk of any court, or other officer of any court; that he is worth the sum specified in the foregoing undertaking, to wit, the sum of five thousand dollars ($5,000.00), exclusive of property exempt from execution and over and above all just debts and liabilities.

D. G. McCARTY.
AL. HILBY.

Subscribed and sworn to before me this 30th day of August, 1904.

[Seal] JAS. TOD COWLES,
Notary Public in and for the District of Alaska.

Sufficiency of sureties on the foregoing bond approved this 31st day of August, 1904.

JAMES WICKERSHAM,
Judge of said Court.

Filed in the U. S. Court, District of Alaska, 3d Division, Aug. 31, 1904. A. R. Heilig, Clerk. By ————— ————, Deputy.

In the United States District Court, for the District of Alaska, Third Division.

O. A. NELSON and G. M. HENSLEY,
Plaintiffs,

vs.

MATT MEEHAN, THOMAS LARSON and MICHAEL McMAHON,
Defendants.

Order Allowing Appeal.

Now, on this 31st day of August, 1904, the same being one of the regular judicial days of the special term of this court held at Fairbanks, District of Alaska, Third Division, this cause coming on to be heard upon the petition of defendants, Matt Meehan and Thomas Larson for an appeal, and the said defendants Matt Meehan and Thomas Larson appearing by their counsel Messrs. Claypool, Stevens and Cowles, and the said defendant Michael McMahon appearing by his counsel David T. Roy, Esq., and the plaintiffs appearing by their counsel H. J. Miller, Esq., and the Court being advised in the premises—

It is ordered that the defendants, Matt Meehan and Thomas Larson, appeal in said cause to the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby allowed; and that a certified

transcript of the record, testimony, exhibits, stipulations, orders, referee's report and plat filed therewith, and all proceedings herein, be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the return day of said appeal and citation be fixed at thirty days from the date hereof and that said defendants Matt Meehan and Thomas Larson shall have 30 days from this date within which to prepare and file their statements of facts and bill of exceptions herein.

It is further ordered that the bond on appeal of the said defendants Matt Meehan and Thomas Larson be, and the same is hereby fixed at the sum of five thousand dollars ($5,000.00) the same when given and approved to act as a supersedeas bond, as well as a bond for costs and damages on appeal; and that all proceedings in said cause on execution or otherwise are hereby stayed.

JAMES WICKERSHAM,

Judge.

Entered Aug. 31, 1904, in Journal 3, p. 282.

In the United States District Court, for the District of Alaska, Third Division.

O. A. NELSON and G. M. HENSLEY,
Plaintiffs,
vs.
MATT MEEHAN, THOMAS LARSON and MICHAEL McMAHON,
Defendants.

Citation.

United States of America, } ss.
District of Alaska. }

The President of the United States, to O. A. Nelson and G. M. Hensley, the Above-named Plaintiffs, and to Michael McMahon, the Above-named Defendant, Greeting:

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal, made and entered in the above-entitled cause, in which O. A. Nelson and G. M. Hensley are plaintiffs and respondents and the said Michael McMahon is a defendant and respondent, and in

which the said Matt Meehan and Thomas Larson are defendants in said action and appellants in said appeal, to show cause, if any there be, why the decree and judgment rendered in said cause in said United States District Court for the District of Alaska, Third Division, against the defendants therein, should not be set aside, corrected and reversed, and why speedy justice should not be done to the said Matt Meehan and Thomas Larson in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 31st day of August, A. D. 1904, and of the Independence of the United States the one hundred and twenty-ninth.

JAMES W. WICKERSHAM,
United States District Judge in and for the District of Alaska, Third Division.

[Seal] Attest: ALBERT R. HEILIG,
Clerk.
By John L. Long,
Deputy.

Service of the within citation and the receipt of a copy thereof admitted this 31st day of August, A. D. 1904.

_____,
Attorney for O. A. Nelson and G. M. Hensley, Plaintiffs.
DAVID T. ROY,
Attorney for Defendant Michael McMahon.

Filed in the U. S. Court, District of Alaska, 3d Division, Aug. 31, 1904. A. R. Heilig, Clerk. By _____, Deputy.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

MATT MEEHAN and THOMAS LARSON,

Appellants,

vs.

O. A. NELSON, G. M. HENSLEY and MICHAEL McMAHON,

Respondents

Affidavit of Service.

United States of America,
District of Alaska. } ss.

Morton E. Stevens, being duly sworn upon his oath deposes and says:

That he is a citizen of the United States and over the age of twenty-one years; that on the 1st day of September, A. D. 1904, at the hour of 4:30 o'clock P. M. at the front door of the courthouse in the town of Fairbanks, Third Judicial Division, District of Alaska, he served the citation in the above-entitled cause upon respondents O. A. Nelson and G. M. Hensley, by delivering to H. J. Miller, their attorney of record, a true copy of said citation.

And that he served upon said respondents O. A. Nelson and G. M. Hensley, the order extending the return day within which to docket said cause, on file herein,

at the time and place above described, by serving a true copy of said order upon H. J. Miller, their attorney of record.

MORTON E. STEVENS.

Subscribed and sworn to before me this 7th day of September, A. D. 1904.

[Seal] JOHN H. DILLON,

Notary Public in and for the District of Alaska.

Filed in the U. S. Court, District of Alaska, 3d Division, Sep. 7, 1904. A. R. Heilig, Clerk. By ———— ————, Deputy.

United States District Court, Third Division, District of Alaska.

O. A. NELSON and G. M. HENSLEY, Plaintiffs,
vs.
M. MEEHAN and T. LARSON, Defendants. } No. 127.

Clerk's Certificate to Transcript.

I, Albert R. Heilig, clerk of the United States District Court for the Third Division of the District of Alaska, hereby certify the foregoing one hundred and eight typewritten pages numbered from 1 to 108 inclusive to be a full, true and correct copy of the record, bill of exceptions, assignment of errors and all proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said

court, and that the same is in full compliance with the order of said Court allowing an appeal of said cause. That pages 109 and 110 and 111 constitute the original citation and proof of service.

I further certify that the cost of the foregoing record on appeal is $75.00 and that said amount was paid by the plaintiffs above named.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Eagle, Alaska, this twentieth day of September, 1904.

[Seal] ALBERT R. HEILIG,
Clerk U. S. District Court for the District of Alaska, Third Division.

[Endorsed]: No. 1125. United States Circuit Court of Appeals for the Ninth Circuit. Matt Meehan and Thomas Larson, Appellants, vs. O. A. Nelson, G. M. Hensley and Michael McMahon, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Third Division.

Filed October 8, 1904.

F. D. MONCKTON,
Clerk.

No. 1173

In The

United States Circuit Court of Appeals

For The Ninth Circuit.

MATT MEEHAN AND
THOMAS LARSON,
Appellants,

vs.

O. A. NELSON,
G. M. HENSLEY AND
MICHAEL McMAHON,
Respondents.

APPELLANTS' BRIEF.

JOHN GARBER and
SIDNEY V. SMITH,
Counsel for Appellants.

Filed this day of February, A. D. 1905.

HICKSTER, 559 California Street.

In The

United States Circuit Court of Appeals

For The Ninth Circuit.

MATT MEEHAN AND
THOMAS LARSON,
Appellants,

vs.

O. A. NELSON,
G. M. HENSLEY AND
MICHAEL McMAHON,
Respondents.

APPELLANTS' BRIEF.

Statement of the Case.

This suit was brought by Nelson and Hensley, two of the respondents, against Meehan and Larson, the appellants, and McMahon, one of the respondents, for the specific performance of an alleged contract by which Meehan and Larson agreed to give the plaintiffs a one-half interest in a certain Alaska mining claim if the plaintiffs should sink thereon three holes to bed-rock. Plaintiffs had judgment in their favor requiring all the defendants to convey to them this interest and for one-half of the royalties and rents collected by all the defendants from the property.

Defendants Meehan and Larson have appealed.

The District Court found that all three of the defendants owned the mining claim, that two of them, Meehan and Larson, entered into the agreement with the plaintiffs above alluded to, that the plaintiffs put the three holes to bedrock; and that all the defendants have received royalties and rents amounting to $3000. (Transcript, pp. 159-161.)

On these facts the Court found as conclusions of law that the plaintiffs were entitled to a decree for a conveyance of one-half of the claim, and to a judgment for one-half of the rents and royalties collected by Meehan and Larson. (Tr., pp. 161, 162.)

Specifications of Error Relied Upon.

The errors relied upon are:

1st. That the Court erred in finding that the plaintiffs performed all the conditions of their agreement. (First Assignment of Errors, Tr., p. 166.)

2nd. That the Court erred in finding that the defendants, after the completion of the sinking of the three holes by plaintiffs, without inspecting the work, promised plaintiffs to make a conveyance, but neglected to examine and inspect the work until it was impossible to do so by reason of said holes having caved in and filled with water. (Third Assignment of Errors, Tr., p. 167.)

3rd. That the Court erred in its conclusion of law,

that the plaintiffs performed all the conditions of their agreement. (Fifth Assignment of Errors, Tr., p. 168.)

4th. That the Court erred in its conclusion of law, that defendants are estopped from questioning plaintiffs' rights to said premises under said agreement by reason of the facts stated in the fifth paragraph of the Findings of Fact herein. (Seventh Assignment of Errors, Tr., p. 168.)

5th. That the Court erred in its conclusion of law that the plaintiffs are entitled to a judgment for one-half of the rents and royalties collected by the defendants, Meehan and Larson. (Eighth Assignment of Errors, Tr., p. 169.)

BRIEF OF THE ARGUMENT.

I.

The finding that plaintiffs performed the work is wholly unsustained by the evidence.

There can be no question that this Court may compare a finding with the evidence, to see if there be any testimony at all to support it, and that, in the absence of all evidence whatever on which the finding can be based, the court must hold, as a matter of law, not of fact, that the finding is improper, and, on that ground will reverse a judgment dependent on such finding.

Davis vs. Schwartz, 155 U. S. 636.
Dooley vs. Pease, 180 U. S. 132.
Hathaway vs. Bank, 134 U. S. 498.

Runkle vs. Burnham, 138 U. S. 226.
Macintosh vs. Price, 121 Fed. 716.
Eureka County Bank vs. Clarke, 130 Fed. 327.
Last Chance Mg. Co. vs. Bunker Hill Co., 131 Fed. 587.

The complaint, necessarily and affirmatively, averred a fulfilment by the plaintiffs of all of the conditions of the contract to be by them performed. The answer denied this averment, and there was thus raised an issue, the affirmative burden of which was cast on the plaintiffs, as to a point of fact absolutely vital to their success in the suit, and as to which the proof should have been clear, positive and complete, with nothing left to inference or guesswork.

The contract sued on required the plaintiffs to dig three holes through the gravel of a mining claim down to the bedrock underlying it. An examination of the record will disclose that Meehan and Larson's denial of the allegation above referred to, their refusal to make a conveyance to the plaintiffs, and their resistance of this suit, are based upon their contention that these three holes were not dug to bedrock as they should have been. For the purpose of determining whether the work had or had not been done in accordance with the contract, these defendants dug three other holes, one adjoining each of the holes dug by the plaintiffs, and after getting down to bedrock drifted along the bedrock and in the direction of the holes dug by the plaintiffs, and seemed to have convinced themselves by this

investigation that one or two of the plaintiffs' holes had never reached the bedrock.

By way of anticipating these defendants' position in this regard, a number of witnesses were called by the plaintiffs, who testified that they had examined the holes dug by the plaintiff and those dug by Meehan and Larson, and that in their opinion the drifts running from the holes dug by Meehan and Larson were not run in the direction of the holes made by the plaintiffs, and the court will find in reading the testimony that it bears almost exclusively on this point. But it must be clear that even the most overwhelming evidence to the effect that Meehan and Larson's exploration of the ground was imperfect and incorrect could not dispense with the necessity on the plaintiffs' part of proving affirmatively that they did do the work, and that in this they wholly failed.

The evidence began (Tr., p. 19) with the testimony of Nelson, one of the plaintiffs, who, being asked what he did in the way of carrying out the agreement, answered: "I fulfilled the contract." Evidently recognizing that this answer was a mere legal conclusion and not proof of a fact, his counsel then said: "State what you did." The witness then said that he and Hensley, the other plaintiff, started a hole on the 6th of February, 1903, and then proceeded as follows: "We had Meehan's dogs and moved our stuff out with them; I went back with them and I came back to six and then the work was started; there was a fire put going

in the first hole and the next morning we cleaned that fire out and started to dig for the second hole, we got that through the muck and had a fire in the two holes and then started on the third hole and kept working away until we got to bedrock in the second hole, that is the hole on the lower end of four, and almost to bedrock on the other hole, that would be on the upper end of three; we was down but I don't remember how many feet; we was down in the third hole and we ran out of grub and built a fire in the second hole; after we got the grub we cribbed and finished two, I was taking some prospects in the third hole but the water filled it and we couldn't do the work and so when we had fulfilled the contract we took and pulled the grub back out of there."

It appears from this statement that after the plaintiffs had done a certain amount of work they got out of provisions, that they came away, replenished their store of food, went back, cribbed and finished two of the holes, and were taking some prospects in the third hole when the water filled it and prevented any further work, and that they then quit the place altogether.

It must be confessed that the witness' language was not clear and does not make easy reading; but both he and his counsel knew that he was testifying as to the point of fact which was essential for him to prove, and if his evidence was left in an unsatisfactory condition the responsibility is with them. Certainly the want of clearness in the statement is not helped out by the fol-

lowing question and answer on page 21: "Q. After you had returned with your grub and finished your work then what did you do? A. After the work was done I went over on Captain Creek one trip, that was on the 6th of March." Both question and answer fail to bring out what work it was the plaintiffs did and finished. Nor is any further light thrown upon the matter by the question and answer at the top of page 24. "Q. Will you state the depth to bedrock? A. The first hole was a strong 16 feet deep and one foot down in the bedrock. The second hole is 17 and some inches to bedrock, I think 3 inches or something like that—anyway it is a strong 17 feet and the other one is 22 feet or about that."

This answer asserts nothing more positively than that the first hole went down a foot into the bedrock, that the second hole went to bedrock, and that the third hole was 22 feet deep. Whether the third hole did or did not reach bedrock was a point which the witness studiously and successfully evaded.

The plaintiff Hensley did not testify, and the evidence above referred to, appearing on pages 19, 20, 21 and 24 of the Transcript, is absolutely all that there is in the record in the way of direct testimony bearing upon the completion of the contract by the plaintiffs.

It is confidently submitted that this testimony was wholly insufficient as proving or even tending to prove such completion, and that the finding of the court to the

effect that the work was completed rests upon no evidence whatever.

Counsel for the plaintiffs seem to have realized this, for they got the trial court to find as a fact (Tr., p. 160), that the defendants, after the completion of the work, promised to make a conveyance but delayed, neglected and failed to make the same and to examine and inspect the work until it was impossible to do so by reason of the holes having caved in and filled with water, and as a matter of law (bottom of p. 161 of the transcript), that the defendants are estopped from questioning plaintiffs' rights to said premises by reason of the facts so found.

As to this, we can only say that we know of no principle of law which from such facts would create an estoppel on the defendants in favor of the plaintiffs to the extent of relieving the plaintiffs from at least the necessity of affirmatively proving that they had complied with their contract.

Not only was there a failure on the part of the plaintiffs to affirmatively prove their completion of the work, but an examination of the record will show that it was positively and affirmatively proved, without any contradiction in the evidence, that they did not complete the work, that is to say: the evidence showed without contradiction that the drift run from the hole dug by Meehan and Larson contiguous to the plaintiffs' hole number three terminated in solid gravel, which had not

been moved or disturbed at all. (Tr. pp. 107, 108, 112, 113, 120, 121, 127, 128, 135.) These references are to the testimony of Boss, Ziemer, Davis, Crowley and Meehan, each and all of whom swore positively that the drift from defendants' hole number three ran wholly through and to undisturbed gravel. Nowhere in the evidence is to be found even an attempt to contradict these positive statements.

The only question of fact remaining was whether this drift was so run as to reach the plaintiffs' hole number three or the place where the plaintiffs' hole number three would have been found if it had been sunk to bedrock. As to this point, there was considerable evidence given on both sides which it will be probably urged by the other side was of such a conflicting character that it cannot be reviewed by this court. But an examination of the evidence will show that it was given by witnesses who spoke largely from mere impressions gained from rude and necessarily inaccurate measurements of the drift and observations of its direction (Tr. pp. 36, 63, 70), and which, whether presented by the plaintiffs or the defendants, were not entitled to much consideration.

In order to clear up this important point of fact the court (Tr. p. 149) appointed R. A. Jackson, a duly qualified and expert surveyor, with instructions to make an accurate survey of the old shaft three and the new shaft three and the drift running from the new shaft for the purpose of determining accurately their posi-

tion with regard to each other, and to make a careful detailed and technical survey for the purpose of ascertaining such facts, and then to make a map thereof showing the exact situation and to make his report thereon to the court.

The referee filed his report (Tr. p. 152) showing that he had cleaned out defendants' shaft three and tunnel and made a survey of the tunnel, and found that it would tap the plaintiffs' shaft number three nine-tenths of a foot from the south end of said shaft crossing the east side line and penetrating under the shaft one and one-tenth feet at an elevation of two and three-tenths feet from bedrock. This report was accompanied by a diagram appearing at page 154 of the Transcript, which clearly shows the plaintiffs' shaft number three as it would have been if it had gone to bedrock, and a vertical cross section of defendants' drift extending two feet and ten inches above bedrock, and that the drift cuts the lines of plaintiffs' shaft as produced.

This, taken in connection with the uncontradicted evidence above cited to the effect that the drift ended in undisturbed gravel, amounts to a mathematical demonstration that the plaintiffs' shaft did not reach bedrock. Add this demonstration to the testimony of the witnesses who swore that there were no traces of bedrock on the dump at the mouth of the plaintiffs' third hole (McLaren, p. 118, Crane, p. 123, Meehan, p. 132) *and whose evidence on this point was absolutely uncontradicted*, and to the failure of Nelson to swear that

hole three went to bedrock, and the conclusion is irresistible that the court, in finding a completion of the work, not only acted without evidence, but in the face of the affirmatively proven and uncontradicted facts.

II.

The case presented does not justify a decree for specific performance. Nothing is better settled than that specific performance is not a matter of absolute right, but rests in the sound discretion of a court of equity. If the circumstances surrounding the transaction are such that specific performance will work a hardship or injustice the court will leave the parties to their remedies at law.

Willis vs. Tayloe, 8 Wall, 567,
Fry on Specific Performance, Sec. 25,
Vol. 22, A. & E. Encyc. of Law, 931.
2 Story's Eq. Jur. Sec. 742,
Johnson vs. Hubbell, 2 Stockt. Ch. 332,
Matthews vs. Davis, 102 Cal. 202, 208.
Marr vs. Shaw, 51 Fed. 860, 864.

It is submitted that the principle of these authorities has a peculiar application to the case at bar.

By the first finding (Tr. p. 159) it is found that at the time of the commencement of this suit all three of the defendants, Meehan, Larson and McMahon, owned the mining claim in question. The nature and extent of the interests of the several defendants was not found and for that we must go to the plaintiff's verified

amended complaint, the truth of whose statements they are not in a position to deny.

The complaint sets out a written agreement between McMahon and Meehan by which they formed a partnership with each other for the purpose of prospecting, locating, occupying and developing mining ground in Alaska (Tr. p. 13). The complaint further states that Meehan had a similar agreement with the defendant Larson, and that the claim was located by and in the name of Meehan (Tr. p. 13).

Whether the result of Meehan's contracts with McMahon and with Larson was to give McMahon an undivided one-quarter or an undivided one-half interest in the mining claim, the subject of this suit, must be a disputable point.

By his answer (Tr., p. 17) he claimed to own an undivided one-half and prayed that his interest be not determined in this action, but in another suit pending in the District Court, brought by him for the purpose of determining the extent of his interests. If he should prevail in that suit the result would be that McMahon and Larson would be held to own only an undivided one-half, and it is this one-half which the lower court has decreed must be conveyed to the plaintiffs. The final result of this is that a court of equity has given effect to an arrangement by which the owners of an undivided half of a mining claim have agreed to convey all their interest therein as a compensation for the labor

of the plaintiffs in sinking three prospect holes thereon to bedrock. From this arrangement Meehan and Larson get no benefit whatever, lose all their title, and McMahon derives the full advantage.

The contract itself, since it contains no mutual promises or agreements, is no contract at all (*Fish vs. Buchanan*, 96 N. W. 339), and is so one-sided and unconscionable that the only explanation for its ever having been entered into must be that at the time of its execution both Meehan and Larson overlooked the interest of McMahon in the property, or else that they intended to give the plaintiffs one-half of such interest as they had. But the result as worked out by the court below inflicts on them an intolerable hardship, which we confidently submit should not be aided by the active interference of a court of equity. The case presented is one in which, under the principles of the authorities above cited, the court should decline to interfere and should leave the plaintiffs to such remedies as they may be afforded in an action at law.

III.

The plaintiffs had judgment (Tr. p. 165) "for one-half of the royalties and rents collected and received by said defendants from said described premises, said one-half of the said rents amounting to the sum of $1,500." There is nothing in the findings or conclusions of law upon which this portion of the decree can be based.

The fourth conclusion of law (Tr. p. 162) was, "that

the plaintiffs are entitled to a judgment and decree for one-half of the rents and royalties collected and received by the defendants M. Meehan and T. Larson," so that the decree, in giving judgment for one-half of the rents and royalties received by all three defendants, went further than the fourth conclusion of law, which confined the plaintiffs' recovery to one-half of the rents and royalties received by two of the defendants, Meehan and Larson.

But further than this, the decree could only be justified by a finding as to the amount of the rents and royalties received by Meehan and Larson, as to which there is no finding whatever.

The seventh finding (Tr. p. 16) was as follows: "That during said time *defendants* have worked and mined said claim through laymen and have collected and received all royalties, rents and profits of the said described premises amounting in the whole to three thousand dollars." There is nothing in the findings showing what proportion of the rents and royalties collected by all three defendants was collected and received by the defendants Meehan and Larson, nor any finding as to the extent of the interest in the mining claim or in its rents and profits owned by Meehan and Larson.

If any effect at all is to be given to the fourth conclusion of law as a guide to what the provisions of the decree should have been, the court should have found

as a fact how much of the rents and royalties were collected and received by Meehan and Larson, and the judgment should have been for one-half of that amount. But, as the matter was left by the findings, there was absolutely no material from which could be determined the amount for which the plaintiff should have judgment.

A study of this record must make it manifest that the case which it presents does not appeal to the favorable discretion of the court. The parties to the contract sued on evidently entered into it in ignorance of or without regard to the rights or claims of McMahon. The extent of his interest is left undetermined, although the acertainment of its amount is essential to a proper judgment. If, as he claims, he is entitled to one-half, the other half is given to the plaintiffs to feed the amount of their claim under the contract, and an agreement from which Meehan and Larson intended and expected to reap an advantage is, by a court of equity, enforced to their ruin.

The burden of pleading and proving that the consideration of the contract to convey was sufficiently adequate to entitle them to the favor of the court was on the plaintiffs.

Agard vs. Valencia, 39 Cal. 492.
Nicholson vs. Tarpey, 70 Cal. 609.
Windsor vs. Miner, 124 Cal. 492.
Prince vs. Lamb, 128 Cal. 120.

Stiles vs. Kain, 134 Cal. 170.

Under these authorities, which express the general rule of law upon the subject, plaintiffs should have pleaded and proved the value of the land, so that the court might judge whether the consideration was fair. This they failed to do, but there is enough in the record to show that the contract of Meehan and Larson to convey was based upon a wholly inadequate consideration. The digging of three small holes to bedrock through muck and gravel for a distance of seventeen feet was a matter of a fortnight's work for two men, and for this, under the decree, they get a half interest in a claim which has already produced ten thousand dollars and is probably worth fifty thousand. Surely, here is enough to startle a court into a doubt as to the propriety of its according to the plaintiffs the extraordinary remedy of specific performance. At least, the circumstances surrounding the contract and the parties to it were such as to make it more than ordinarily incumbent on the plaintiffs to make a full and distinct showing of their completion of the work for which they are claiming compensation on so large a scale. Instead of this the court below proceeded upon evidence which is wanting in every essential element of conclusiveness: on the statement of only one of the two plaintiffs, who declined to say, except by inference, that the work had been done. And, finally, to make this weak and insufficient testimony the basis of its findings and decree, the court was obliged to

reject and did reject the clear, positive, uncontradicted and unchallenged testimony of persons having no interest in the suit, who swore that there was no trace of bedrock on the dump about the plaintiffs' third hole, that the defendants' third drift reached the space where the plaintiffs' third hole would have been if it had been sunk as the contract required, and that this space was occupied by gravel which had never been disturbed. It is confidently submitted that the record discloses a case which should not have favorably moved a court of equity, and where the conclusions of fact are not only without evidence to sustain them, but are opposed to the only clear and positive testimony which was before the court.

Not only does this complete rejection and disregard of the evidence by the court need to be explained, but some reason must be sought for the action of the court below in finding the estoppel to which we have above referred. Manifestly, if the court considered that the evidence proved the plaintiffs' completion of the contract, the finding as to the estoppel was purely unnecessary and superfluous. In seeking, therefore, a reason for the court's finding as to the estoppel, we are driven to the conclusion that the estoppel and not the evidence was the basis of the finding as to the plaintiffs' completion.

The court found that the plaintiffs had completed their contract, not because the evidence so showed,

but because the court conceived that the defendants' conduct prevented them from disputing the fact. In this way, and in this way only, can all the findings of the court when taken together, be explained and harmonized, and the result is that the judgment must be based upon a legal conclusion so clearly wrong that its error needs no illustration from us.

We submit that the record shows that the case was not properly tried, and that the interests of justice demand that the judgment should be reversed and a new trial ordered.

Respectfully submitted,

JOHN GARBER and
SIDNEY V. SMITH,
Counsel for Appellants.

No. 1125.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MATT MEEHAN and THOMAS LARSON,

Appellants,

v.

O. A. NELSON, G. M. HENSLEY and MICHAEL McMAHON,

Respondents.

RESPONDENTS' BRIEF.

H. J. MILLER,
Attorney for Respondents.

T. C. WEST,
of Counsel.

Pernau Press.

No. 1125.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MATT MEEHAN and THOMAS LARSON,

Appellants,

v.

O. A. NELSON, G. M. HENSLEY and MICHAEL McMAHON,

Respondents.

RESPONDENTS' BRIEF.

The statement of the case contained in the brief of the appellants is correct.

The appellants set out eleven assignments of error as shown by the Transcript of Record, at page 166 thereof, but abandon all of these with the exception

of five, namely, the first, third, fifth, seventh and eighth, as shown in appellants' brief, at page 2 thereof.

The writer will endeavor to take up the specifications of error relied upon by appellants, in the order in which they discussed them.

I.

"That the Court erred in finding that the plaintiffs " performed all the conditions of their agreement."

This seems to be the point most relied upon by counsel for appellants.

The agreement between the parties is set out *in haec verba,* at page 11 of the Transcript of Record. The condition on the part of the respondents to be performed was the sinking of three holes to bedrock. The question, therefore, is a very narrow one that this Court is called upon to determine.

Is there any evidence at all, upon which the lower court could base its conclusion, that the respondents had performed the condition required of them?

Where there is any testimony whatever consistent with the finding, or where there is a conflict of evidence, or a question of the credibility of witnesses, the conclusion of the Court below will be treated as unassailable, no matter how ingenious or convincing the argument may be that, upon the evidence, the

findings should have been different, and the finding of the Court below will not be disturbed where there is any evidence whatever upon which such findings could be made. As to this point, the writer desires to refer to the same cases cited by Counsel for appellants, at page 3 of their brief, namely:

Davis v. Schwartz, 155 U. S. 636;
Dooley v. Pease, 180 U. S. 132;
Hathaway v. Bank, 134 U. S. 498;
Rankle v. Burnham, 138 U. S. 226;
MacIntosh v. Price, 121 Fed. Rep. 716;
Eureka County Bank v. Clarke, 130 Fed. Rep. 327;
Last Chance Mg. Co. v. Bunker Hill Co., 130 Fed. Rep. 587.

Also, and particularly:

Stanley v. Albany Co. Supers., 121 U. S. 547;
Gates v. Andrews, 97 Amer. Dec. 764;
Wilson v. Rybolt, 79 Amer. Dec. 486;
Bohannon v. Combs, 10 Amer. St. Repts. 328.

The Appellate Court will never weigh evidence for the mere purpose of determining the preponderance, and controverted questions of fact will not be reconsidered on appeal.

Isler v. Bland, 117 Ind. 457;
Chicago etc. Ry. Co. v. West, 125 Ill. 320.

The law, therefore, being clear on this point what is the evidence upon which the trial Court based its finding?

See evidence of O. A. Nelson, page 19 of Transcript.

"Q. Did you do anything under that arrange-
"ment in the way of carrying out the agreement?"
"A. I fulfilled the contract."

Also, evidence of W. H. Woolridge, pages 31, 32, 33, 34, and 38, of Transcript.

See also, evidence of George Steelsmith, pages 50, 51, 53 and 54, of the Transcript.

See also evidence of Oscar Gibbs, pages 58, 59, 60, 61 and 62, of the Transcript, and of W. G. Crabbe, at pages 69, 70, and 71, of the Transcript, also of George Ashenfelter, page 74 of the Transcript.

The witness James McPike testifies to the same facts, see pages 78 and 79 of the Transcript.

See also, evidence of O. A. Nelson, re-called, page 80, of the Transcript.

There is also evidence, that the appellant Larson, admitted that the respondents had sunk these holes to bedrock and fully performed their part of the agreement. As to this, see evidence of H. J. Miller, at page 84, of the Transcript.

Turning to the evidence of the respondent Lar-

son, at page 86 of the Transcript, he swears, referring to hole number one, "that hole went to bedrock".

Again speaking of hole number two, and judging from indications of the dump around it, he says, " it didn't show any bedrock on the surface", and of the third hole, " I should judge it went through " the muck".

There was no reason why the dump should show any indications of whether or not the holes went to bedrock. There was no agreement on the part of respondents to go *into* bedrock, or to excavate any of it, the agreement reads, "In consideration of " sinking these holes *to* bedrock, etc". This also was the clear understanding of the respondent Larson, even if the agreement was less clear on that point, for in his evidence, at page 85 of the Transcript, when, upon being asked if he was one of the parties to the agreement made with Nelson and Hensley, and replying in the affirmative, he was next asked the question, "about sinking 3 holes on " these claims?", he gave the answer, "Yes, to bed- " rock".

The evidence of the respondent Larson shows that he did not visit the holes in question until some five months after they had been sunk and at the time of his visit they (very naturally), had caved in.

It is claimed by counsel for the appellants, at

pages 8 and 9 of their brief, that the testimony of Boos, Zeimer and others conflicts with that of the respondents, but, if that is the case, which the respondents do not admit but on the contrary deny, the appellants bring themselves within the rule of law that where there is a conflict of evidence the decision of the trial Court will under no circumstances be disturbed for the reasons and under the authorities above cited.

The Court below having had ample evidence before it upon which to base its findings, it is submitted, that the other questions raised by counsel for the appellants are purely academic and call for an answer merely because of the great learning and standing at the bar of the counsel raising them.

When the facts found sustain the judgment, it is not necessary to go further and find upon other issues:

Malone v. Co. of Del Norte, 77 Cal. 217.

II.

That the Court erred in finding that the defendants, after the completion of the sinking of the three holes by plaintiffs, without inspecting the work, promised plaintiffs to make a conveyance, but neglected to examine and inspect the work until it was impossible to do so by reason of said holes having caved in and filled with water.

This again is a question of fact that the Court below resolved in favor of the respondents and to which the authorities above mentioned equally apply.

There is ample evidence that the appellants promised to make the conveyance and also that they neglected to examine and inspect the work until it was impossible to do so by reason of the fact that the sides had sluffed in and the holes were filled with water.

As to this see the evidence of the appellant Larson who swears that he did not examine the holes until July.

III.

That the Court erred in its conclusion of law that the plaintiffs performed all of the conditions of their agreement.

It would seem elemental that if the Court found as a fact that the respondents had performed all the conditions of the agreement that it would be justified in finding the same conclusion of law.

IV.

It is submitted that the findings of the Court below with regard to the 4th and 5th specifications of error relied upon by counsel for the appellants flow as a natural consequence from the findings of facts referred to.

Lastly, the learned counsel complain that a study of the record makes it manifest that the case which it presents does not appeal to the favorable discretion of the Court.

Courts, of course, will not set aside an agreement merely upon the ground that a bad bargain has been made, but in this case a bad bargain even is not shown to have been made, as anyone familiar with mining matters in Alaska, as the learned Judge of the Court below undoubtedly is, well knows. The conditions of mining are different there than anywhere else in the world and this fact being known and considered by the trial Judge, it is submitted, is perhaps one of the greatest reasons why his findings on questions of fact should not be disturbed.

It is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

H. J. MILLER,
Attorney for Respondents.

T. C. WEST,
of Counsel.

No. 1126

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE LIFE INSURANCE COMPANY OF NEW YORK (a Corporation),

Plaintiff in Error,

vs.

PRISCILLA DOBLER,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Washington, Western Division.

The Filmer Bros. Co. Print, 424 Sansome St., S. F.

INDEX.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK,
Plaintiff in Error,

vs.

PRISCILLA DOBLER,
Defendant in Error.

Stipulation and Order Extending Time of Filing Record.

It is hereby stipulated and agreed by and between the parties hereto, by the respective attorneys, that the time for filing in this court the transcript of the record and return to the writ of error heretofore issued to the Circuit Court of the United States for the District of Washington, Western Division, in this cause, be enlarged and extended until the fifteenth day of October, 1904, and that an order be entered herein accordingly.

Dated, September 20th, 1904.

PARSONS, PARSONS & PARSONS,
Attorneys for Plaintiff in Error.

S. WARBURTON,
J. H. McDANIELS,
Attorneys for Defendant in Error.

Order.

Upon reading and filing this stipulation of the parties and good cause appearing therefor, it is ordered that the

time for filing in this court the transcript of the record and return to the writ of error heretofore issued to the Circuit Court of the United States for the District of Washington, Western Division, be enlarged and extended until the fifteenth day of October, 1904.

Dated, September 24th, 1904.

WM. W. MORROW,
Judge.

[Endorsed]: No. 1126. In the United States Circuit Court of Appeals for the Ninth Circuit. Mutual Reserve Life Insurance Company, of New York, Plaintiff in Error, vs. Priscilla Dobler, Defendant in Error. Stipulation and Order. Filed Sep. 24, 1904. F. D. Monckton, Clerk.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE CO., OF NEW YORK,
Defendant.
No. 970.

Complaint.

Comes now the above-named plaintiff by her attorney and for cause of action against the above-named defendants complains and alleges:

I.

That the plaintiff during all the times herein mentioned was and now is a citizen, resident and inhabitant of the State of Washington.

II.

That during all the times herein mentioned the defendant was and is a corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal place of business in the city of New York.

III.

That on or about the 7th day of November, 1902, the defendant in consideration of the sum of $381.80 to it in hand paid from one Frederick C. Dobler, for and on behalf of plaintiff, made, executed and delivered in the State of Oregon a certain contract or policy of insurance whereby it insured the life of said Frederick C. Dobler in the sum of $10,000. Said defendant in said contract agreed to pay plaintiff, Priscilla Dobler, in case of the prior death of Frederick C. Dobler, at the time of the death of Frederick C. Dobler the sum of $10,000.00.

IV.

That said contract or policy of insurance is in words and figures as follows, to wit:

MUTUAL RESERVE LIFE INSURANCE COMPANY.

Frederick A. Burnham, President.

Amount.

No. 1004047.

Age, 32. $10,000.00

Home Office: Mutual Reserve Building, New York, U. S. A.

Chief office for Great Britain, 79 Cannon St., London, E. C.

Direction General Pour Le Continent De L'Europe, 8 Rue Halevy, Paris.

This policy of assurance witnesseth that in consideration of the application herefor, hereby made a part of this contract, and of three hundred and eighty-one dollars and eighty cents to be actually paid in cash as a First Premium on or before the delivery hereof, Mutual Reserve Life Insurance Company promises to pay ten thousand dollars to Priscilla Dobler (mother) of Sumner, County of Pierce, State of Washington, if living at the time of the death of Frederick C. Dobler of Cornucopia, County of Baker, State of Oregon, herein called the Assured), subject to evidence of the death of said Assured within one year from date hereof.

If the said Assured survive the said year, and shall, on or before the seventh day of November of each and every succeeding year, to and including the twentieth year from date hereof, unless death occurs sooner, pay to the said Company the like amount of premium, then this Contract shall be renewed and thereafter continued as a Contract of Whole Life Assurance, and upon the decease of the

said Assured the said Company will pay the principal sum as above provided.

The Benefits and Provisions on the second and third pages hereof are hereby made a part of this contract.

The said Mutual Reserve Life Insurance Company has caused this policy to be signed by its President or Vice-President and Secretary or Assistant Secretary at the City of New York, this seventh day of November, one thousand nine hundred and two.

F. A. BURNHAM,
President.

P. J. JONES,
Assistant Secretary.

One year term and limited payment.

Examined by C. A. M. & H.

Premiums may be paid in cash or 33-1/3% by annual premium note, and balance in cash.

Second page.

BENEFITS AND PROVISIONS.

When Contract Takes Effect.

I. This policy shall not take effect until it is delivered to the Assured in person, during his lifetime and while in good health, and the first payment is received in cash, signed by the Treasurer of the Company, is issued prior to such delivery, and then only in accordance with the terms of such receipt.

Payments, Waivers.

II. Each premium is due and payable at the Home, Office of the Company in the City of York, but may be

paid elsewhere to a duly authorized Collector but only in exchange for the Company's official receipt signed by its treasurer. If any premium shall not be paid when due, then this policy shall expire and terminate, except as herein provided. No contract, alteration or discharge of contracts, waiver of forfeitures, or granting of permits or credits, shall be valid, unless the same shall be in writing, signed by the President or Vice-President and one other officer of the Company.

Notices and Premiums.

III. Should this Policy be renewed as a Contract of whole Life Assurance, the net premiums hereunder for succeeding years will be that of a date and age one year greater than that of issue, but without increase in the premium payable by the Assured. A notice addressed to the Assured or other person designated by him, at the last postoffice address appearing on the books of the Company, shall be deemed sufficient notice, and affidavit of, or proof of, addressing and mailing the same according to the usual course of business of the Company, shall be taken and admitted as evidence and shall constitute and be held to be conclusive proof of due notice to said Assured and every person accepting or acquiring any interest hereunder.

Grace in Payment of Premiums.

IV. A grace of thirty days, during which the policy remains in full force, will be allowed in payment of all premiums, excepting the first, subject to an interest charge at the rate of five per cent per annum.

Reinstatement.

V. The Assured may secure reinstatement of this policy at any time after the nonpayment of any premium, under the following conditions; written application to the Home Office with evidence of assurability satisfactory to the Company; payment of premiums from the date to which premiums were duly paid to the date of reinstatement, with interest at the rate of five per cent per annum, and payment or reinstatement of any loans, including payment of any interest due and unpaid?

Risks not Assumed.

VI. Death of the assured caused by any violation of law, or by his own hand, whether sane or insane, voluntary, or involuntary, is not a risk assumed under this contract within three years from its date. Should the death of the assured occur while actually engaged in any Military or Naval Service, or within six months from the date of wounds received in such Service, there shall be payable, subject to all the conditions of this Contract, only a sum equal to the premiums paid hereon, not exceeding the face of the Policy.

Assignments.

VII. Permission is given the assured to assign this policy or change the beneficiary hereunder, but the same shall not be valid unless made with the written consent of the Company and in accordance with its rules and shall be subordinate to any premium or other lien which may exist in favor of the Company hereunder. The Company shall not be responsible for the validity of any assignment.

Proofs of Death.

VIII. The proofs of death by which this contract matures must be furnished to the Company at its Home Office in the City of New York, which proofs shall comprise evidence satisfactory to the Executive Committee of the causes and manner of death, and that during the continuance of this policy, and must comply fully with the Company's forms in use and requirements made at the time of the death of the Assured. No action at law or suit in equity shall be maintained hereon, or recovery had, unless the same is commenced within one year from the day of the death of the Assured without reference to the time of furnishing proofs of death, any statute of limitation to the contrary notwithstanding. Upon the maturity of this contract there shall be deducted from the sum payable hereunder any indebtedness of the Assured or the beneficiary to the Company, including the balance, if any, of premiums for the then policy year.

Installment Benefits.

IX. The assured may change the mode of payment of the proceeds in this policy as a death claim, at any time, if not then assigned, from payment in one sum, as provided on the first page, to payment by annual installments, as stated below.

The following tables are based upon a policy of $1.00, and will apply pro rata to the amount payable under this policy, provided the amount is not less than $1,000; if the amount is less than $1,000 these installment benefits shall not apply, but the proceeds of this policy will be payable in one sum only.

Annual installments limited to the number stated below. Any number from two to twenty-five may be selected by the Assured.

No. of Installments—Am. of Each Installment:

25	20	19	18	17	16	15	14	
$56	$65	$67	$70	$73	$77	$81	$85	
13	12	11	10	9	8	7	6	5
$91	$97	$104	$113	$124	$138	$155	$179	$211
4	3	2						
$261	$343	$507						

Illustration.—If payment is to be made by twenty installments, the amount of each installment will be $65.00 for each $1,000 of assurance.

Third Page.

BENEFITS AND PROVISIONS.

Incontestability.

X. This policy having been in continuous force from its date of issue, after two full annual premuims have been paid hereon, shall thereafter, under the limitations of Provision VI, be incontestable, except for fraud, nonpayment of premiums as herein provided, or for misstatement of the age of the assured in the application therefor, subject to the provisions hereof.

XI. Cash loans may be obtained on the sole security of this policy at any time after it has been in force three years, upon application in writing to the Home Office of the Company, and subject to the terms of its loan agreement. The amount of loan available at any time

is stated below and includes any previous loan then unpaid. Interest will be at the rate of five per cent, per annum in advance..

Surrender Options.

XII. After this policy has been in force three full years, the cash value based on the number of full years' premiums that have been paid, less any indebtedness to the Company, will be available for one of the following purposes:

Paid-up Assurance.

1. This policy, upon surrender while still in force and the written request of the assured, will be continued by the company without payment of further premiums, participation in surplus or the right of securing loans, for such an amount of assurance (the same to be subject to the conditions of this policy), payable at the death of the assured, as the last cash value determined as above will purchase; and this policy shall thereafter be payable only for such reduced amount.

Cash Value.

2. Upon the surrender and cancellation of this policy at the end of the third or any completed policy year thereafter, the assured may withdraw the value, determined, as above, in cash.

Automatic Nonforfeiture.

3. If any premium is unpaid when due, so long as the aggregate indebtedness under the terms of this policy is less than the cash value the amount so due and subsequent premiums, with interest thereon at the rate of five per cent per annum, compounded annually, shall, without action of the assured, become a loan as if made under provision XI and shall constitute a first lien against the policy in favor of the company, and this assurance shall automatically continue in force with right to the assured to resume premium payments hereunder, without medical re-examination; but whenever said indebtedness shall exceed said cash value, this policy shall, without action or notice by the company, become and remain wholly null and void.

N. B.—Values will, under the above provisions, if all premiums have been fully paid in cash, and there is no indebtedness to the company, be as follows for each one thousand dollars of assurance:

To Find the Full Cash, Loan or Paid-up Value of this Policy Multiply by 10.

Age 32. 20 Yr. Lim. Pay.

End of Year.	20 Payment Cash Value.	$1000, Age 32 Loan Value.	Paid-up Assurance.	Extended Assurance. Yrs.	Days.
1	XX	XX	XX		30
2	XX	XX	XX		30
3	$30	$64	$100	2	317
4	52	87	157	4	155
5	75	111	214	5	343
6	100	136	271	7	117
7	126	162	328	8	288
8	152	188	385	10	116
9	180	216	442	12	186
10	209	243	500	15	320
11	236	270	550	19	137
12	264	299	600	23	10
13	293	328	650	26	286
14	323	259	700	30	299
15	355	391	750	35	131
16	388	424	800	40	239
17	422	458	850	For	life
18	457	494	900	For	life
19	493	531	950	For	life
20	531	543	1000	For	life

OPTIONS.

The accumulation period under this policy ends 20 years from its date. If the assured be then living, and premiums duly paid, this policy may be continued or

surrendered by the assured under one of the following options:

1. Continue policy as herein provided and receive the cash surplus then apportioned by the company.

2. Continue policy as herein provided and apply the cash surplus then apportioned by the company as a single premium to purchase additional assurance, subject to the conditions of policy and satisfactory evidence of good health.

3. Convert the policy into an endowment payable at such age as the cash value, including the cash surplus then apportioned.

5. If assured elects to continue this policy beyond the accumulation period, under one of the three options first named above, no further dividend shall be apportioned to it excepting at the end of each period of five years thereafter.

This policy participates in surplus only as herein provided, and any indebtedness of the assured or beneficiary hereunder shall be deducted from any values, surplus or dividends arising under the provisions of this policy.

SURVIVORSHIP-BONUS.

It is agreed with the assured hereunder that the sum of one dollar per thousand of assurance from the first and each succeeding annual cash premium made within twenty years hereafter on policies of similar plan and form hereto, issued by the said company between the first and last days inclusive of the year of original issue of this policy, shall constitute a Survivorship-Bonus

fund and at the expiration of twenty years from the last day of said year, that portion of said fund and its earnings arising from contributions thereto by policies issued as above which terminate by death or nonpayment of premiums thereon within twenty years from their date, shall be divided among the assured under such of said policies as have continued in force under their original premium paying conditions throughout the full period aforesaid, who are then living proportioned to the amount of assurance held by each, the same to be an additional cash dividend hereunder.

Premium return.—If this policy matures by death within twenty years from its date while in the force under its original premium paying conditions, there shall be payable to the beneficiary herein named as a Mortuary Dividend an amount equal to one-third the premiums paid hereon.

No. 1004047

Always give number of policy when writing to the office.

MUTUAL RESERVE LIFE INSURANCE COMPANY.

Frederick A. Burnham, President.

Mutual Reserve Building,

New York.

Limited Payment Policy

FREDERICK C. DOBLER

Date, November 7th, 1902.

Amount of Policy, $10,000.00

Policy-holders must send to the New York Office of the Company prompt notice of any change in Postoffice address.

V.

That the application referred to in said policy of insurance is not in the hands of plaintiff but is in the hands and possession of defendant. That plaintiff cannot set forth a copy thereof.

VI.

That plaintiff, Priscilla Dobler, is the mother of said Frederick C. Dobler.

VII.

That said Frederick C. Dobler died in the county of Baker, State of Oregon, on the third day of March, 1903.

VIII.

That plaintiff, the mother of said Frederick C. Dobler was living at the time of the death of said Frederick C. Dobler.

IX.

That Frederick C. Dobler during his lifetime did not assign said policy of insurance nor change the beneficiary thereunder; that at the time of the death of said Frederick C. Dobler, said plaintiff was and now is the beneficiary under said contract of insurance.

X.

That on or about the fourth day of March, 1903, said defendant was notified of the death of said Frederick C. Dobler.

XI.

That on or about the 17th day of July, 1903, the defendant denied to plaintiff any and all liability on said policy of insurance.

XII.

That again, on or about August 11th, 1903, defendant denied to plaintiff all liability on said policy of insurance; that said defendant by said denials waived the right to claim any other or further proofs of the death of said Frederick C. Dobler.

XIII.

That said policy contained the following provision: Premium Return.—"If this policy matures by death within twenty years from its date while in due force under its original premium paying conditions, there shall be payable to the beneficiary herein named as a Mortuary Dividend and amount equal to one-third the premiums paid hereon."

XIV.

That said policy matured within twenty years from its date, to wit, within four months after the date of its issue; that said plaintiff, prior to said Frederick C. Dobler's death had paid on said policy one premium in the sum of $381.80.

XV.

That said Frederick C. Dobler during his lifetime duly performed all the conditions of said contract by him to be performed.

XVI.

That plaintiff, Priscilla Dobler, during the lifetime of said Frederick C. Dobler duly performed all the conditions of said contract by her to be performed.

XVII.

That defendant has wholly failed, neglected, and refused to pay to plaintiff said policy of insurance or the sum of $10,127.26, or any part thereof.

Wherefore, plaintiff prays for judgment against said defendant in the sum of $10,000, together with the sum of $127.26, being one-third of the first premium paid on said policy, together with interest thereon at the rate of six per cent per annum from the 3d day of March, 1903. Also her costs and disbursements in this action.

S. WARBURTON,
Attorney for Plaintiff.

State of Washington, }
County of Pierce. } ss.

Priscilla Dobler, being first duly sworn, on oath deposes and says, that she is the plaintiff above named; that she has read the foregoing complaint, knows the contents thereof and believes the same to be true.

PRISCILLA DOBLER.

Subscribed and sworn to before me this 4th day of September, A. D. 1903.

J. P. BUNDY,
Notary Public in and for the State of Washington, Residing at Summer, in said County.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK,
Defendant.

Interrogatories.

Comes now the above-named plaintiff and propounds to the defendant above named the following interrogatories to be by it answered according to the statute.

Inter. I.

When was the first premium paid on policy of insurance No. 1,004,047, issued by defendant company on the life of Frederick C. Dobler, being the same policy mentioned in plaintiff's complaint?

Inter. II.

If said premium was paid in two or more installments or part payments, give the date and amount so paid in each installment or part payment.

Inter. III.

Was one William Hyde Stalker during any part of October, November or December, in the year 1902 and

also in the year 1903, acting as agent for defendant company in the State of Oregon or any part of Oregon?

Inter. IV.

If said William Hyde Stalker was the agent of said defendant company during part of the years 1902 or 1903, please give the date at which time he became such agent and at what time he ceased to so act, if he has ceased.

Inter. V.

Did said William Hyde Stalker deliver into the hands of said Frederick C. Dobler, policy of insurance issued by defendant company, No. 1,004,047? If so, at what time?

Inter. VI.

If in the preceding interrogatory defendant states that said William Hyde Stalker did not deliver said policy No. 1,004,047 into the hands of said Frederick C. Dobler, state what party did.

Inter. VII.

Did said William Hyde Stalker take the note of said Frederick C. Dobler in payment or in part payment of the first premium in said policy of insurance, No. 1,004,-047?

Inter. VIII.

Was the company ever informed that said William Hyde Stalker took the note of Frederick C. Dobler in payment or part payment of the first premium on said policy, No. 1,004,047?

Inter. IX.

If defendant answers the preceding interrogatory in the affirmative, and if said information was given by a letter, writing or telegram, attach the original letter, writing or telegram or a copy thereof to the answers to these interrogatories with proper marks of identification.

Inter. X.

Was defendant company aware of the custom or practice of William Hyde Stalker to frequently take the notes of new policy-holders in defendant company (when requested to do so by such new policy-holders), if said Stalker considered them solvent and their notes good, in payment of the first premium on policies issued by defendant company and delivered by said Stalker to said policy-holders?

Inter. XI.

Did defendant company ever receive any notice of assignment or change of beneficiary by Frederick C. Dobler of said policy, No. 1,004,047?

Inter. XII.

Was one Mark T. Kady of Portland, Oregon, during any part of the years 1902 or 1903, the general and managing agent of defendant company in the State of Oregon? If so, give the dates between which he was so acting.

Inter. XIII.

If defendant answers the preceding interrogatory in the negative, state what relation existed between Mark

T. Kady of Portland, Oregon, and the defendant company, during any part of the years 1902 and 1903.

S. WARBURTON,
Attorney for Plaintiff.

[Endorsed]: Filed in the U. S. Circuit Court. Sept. 4, 1903. A. Reeves Ayres, Clerk. Saml. D. Bridges, Deputy.

In the Circuit Court of the United States, for the District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK,
Defendant.
No. 970.

Motion to Make Complaint More Definite and Certain:

Comes now the defendant, Mutual Reserve Life Insurance Company, by Parsons, Parsons & Parsons, its attorneys, and moves the Court that plaintiff be required to make her complaint herein more definite and certain in the following particulars, to wit:

By stating whether the denials of liability upon said policy of insurance, alleged in paragraphs XI and XII of said complaint to have been made by defendant, were made orally or in writing.

If it be alleged that said denials of liability were made orally that plaintiff be required to state where,

by what officer or officers of defendant corporation the same were made and the substance thereof.

If it be alleged that said denials of liability were made in writing, that plaintiff be required to embody or attach to her complaint copies of such writings.

Dated, September 23d, 1903.

PARSONS, PARSONS & PARSONS,

Attorneys for Defendant.

[Endorsed]: Filed September 24th, 1903. A. Reeves Ayres, Clerk.

In the Circuit Court of the United States, for the District of Washington, Western Division.

PRISCILLA DOBLER, Plaintiff,

vs.

MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK, Defendant.

No. 970.

Motion to Strike Interrogatories.

Comes now the defendant, Mutual Reserve Life Insurance Company by its attorneys, and moves the Court:

That the interrogatories filed herein by plaintiff, propounded to the defendant to be answered according to the statute, be stricken from the files, for the reason

that the same were filed without warrant or authority in law.

Dated, September 23d, 1903.

PARSONS, PARSONS & PARSONS,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 24, 1903. A. Reeves Ayres, Clerk.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK,
Defendant.
No. 970.

Order Denying Motion to Strike Interrogatories.

The matter of the motion of defendant to require plaintiff to make more definite and certain, certain portions of her complaint and also the motion of defendant to strike the interrogatories of plaintiff heretofore propounded to defendant, having come on for hearing and the Court being fully advised in the premises;

It is ordered that each of the above-mentioned motions be and the same is hereby denied. Thirty days

allowed plaintiff's complaint and to answer the interrogatories propounded by plaintiff.

C. H. HANFORD,
Judge.

[Endorsed]: Filed U. S. Circuit Court, District of Washington. November 25th, 1903. A. Reeves Ayres, Clerk. Saml. D. Bridges, Deputy.

In the Circuit Court of the United States, for the District of Washington, Western Division.

PRISCILLA DOBLER, Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK, Defendant.
No. 970.

Answer.

Comes now the defendant Mutual Reserve Life Insurance Company a corporation, by Parsons, Parsons & Parsons, its attorneys, and answering plaintiff's complaint herein, alleges:

1. It has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs one, six, seven and eight of said complaint, and therefore denies each and every the allegations in said paragraphs made and contained.

2. It has no knowledge or information sufficient to form a belief as to the truth of the allegations con-

tained in paragraph nine of said complaint, but admits that it has received no notice of any transfer or assignment of said policy of assurance.

3. It denies each and every the allegations made and contained in paragraphs ten, twelve, fourteen, fifteen and sixteen of plaintiff's said complaint.

4. It admits the truth of the allegation made and contained in paragraphs two, five, eleven and thirteen of said complaint.

5. It denies each and every the allegations in paragraph three of said complaint made and contained, except as hereinafter admitted, qualified or explained.

6. It admits that the copy of a policy of assurance set out in paragraph four of said complaint is a true copy of policy of assurance No. 1,004,047 as made out by this defendant.

7. It admits the truth of the allegation contained in paragraph seventeen of said complaint that it has refused to pay plaintiff the sum of $10,127.26, or any part thereof.

8. It denies each and every the allegations in said complaint made and contained not herein admitted, qualified or explained.

For further answer and as its first affirmative defense to plaintiff's alleged cause of action, defendant says:

1. That on or about the 20th day of October, 1902, one Frederick C. Dobler applied to this defendant for a policy of assurance in the sum of $10,000.00 upon his life, the beneficiary in said policy to be his mother,

Priscilla Dobler. That said application was in writing, duly signed by said Frederick C. Dobler and said Priscilla Dobler.

2. That by the terms of said written application it was, among other things, expressly provided:

"I hereby agree that the answers and statements contained in parts I and II of this application, by whomsoever written, are warranted to be full, complete, material and true, and that this agreement, together with this application, are hereby made part of any policy that may be issued hereon; that if any of the answers or statements made are not full, complete and true, or if any condition or agreement shall not be fulfilled as required herein or by such policy then the policy issued hereon shall be null and void, and all money paid thereon shall be forfeited to said company; that the person soliciting or taking this application, and also the medical examiner, shall be the agents of the applicant as to all statements and answers in this application, and no statement or answers made or received by any person, or to the company, shall be binding on the company, unless such statements or answers be reduced to writing contained in this application; that the principles and methods employed by the company in any distribution of surplus, apportionment of profits or cost belonging to any policy that may be issued hereunder are accepted and ratified by and for every person who shall have or claim any interest in the contract. And I hereby expressly waive all provisions of law now existing or that may hereafter exist, preventing any physician from dis-

closing any information acquired in a professional capacity or otherwise, or rendering him incompetent as a witness in any way whatever, and for myself and for any other person accepting or acquiring any interest in such policy, authorize and request any such physician to testify concerning my health and physical condition. I further agree not to use alcoholic or malt liquors to excess, or habitually use opium, hydrate of cloral or other narcotics (tobacco excepted); and that under no circumstances shall the assurance hereby applied for be in force or the company incur any liability hereunder until the actual payment in cash of the first premium, while I am in good health, in exchange for a receipt on the company's authorized form, signed by its treasurer, and then only in accordance with the terms of said receipt and after the application shall have been received and approved by the company at its home office and a policy actually issued hereon.

"And I further expressly warrant that I have read the questions and answers contained in this application in parts I and II hereof, and each and all of them, and that said answers and each and all of them are my answers.

"And I do further expressly warrant that I have not, nor has anyone on my behalf, made to the agent or medical examiner, or to any other person, any answers to the questions contained in this application other than or different from the written answers contained in this application.

"And I do further expressly warrant that I have not, nor has anyone on my behalf, given to the agent or medical examiner, or to any other person, any information or stated any facts, in any way contradictory of or inconsistent with the truth of the answers as written in this application in parts I and II hereof, and of each and every one of the same, it being distinctly and specifically understood and agreed that the validity of any policy to be issued hereon is and shall be dependent upon the truth or falsity of the written answers contained in this application in parts I and II hereof to the questions therein propounded."

3. That thereafter and on or about the 7th day of November, 1902, upon receipt of said written application, this defendant made out its certain policy of assurance upon the life of said Frederick C. Dobler, in accordance with said written application, being policy No. 1,004,047, and a copy of which is set out in plaintiff's complaint herein.

4. That by the terms of said policy of assurance it was, among other things, expressly provided:

(A) "This policy of assurance witnesseth that in consideration of the application herefor, hereby made a part of this contract, and of three hundred and eighty-one dollars and eighty cents to be actually paid in cash as a first premium on or before the delivery hereof, Mutual Reserve Life Insurance Company promises to pay ten thousand dollars to Priscilla Dobler 'Mother,' of Sumner, County of Pierce, State of Washington, if living at the time of the death of Frederick C. Dobler,

of Cornucopia, County of Baker, State of Oregon, herein called the assured (otherwise, to the executors or administrators of the assured), subject to evidence of the death of said assured within one year from date hereof."

(B) "When Contract Takes Effect.

I. This policy shall not take effect until it is delivered to the assured in person, during his lifetime and while in good health, and the first payment made in cash, except where a binding receipt, signed by the treasurer of the company, is issued prior to such delivery, and then only in accordance with the terms of such receipt."

(C) "Payments, Waivers.

II. Each premium is due and payable at the home office of the company in the city of New York, but may be paid elsewhere to a duly authorized collector, but only in exchange for the company's official receipt signed by its treasurer. If any premium shall not be paid when due, then this policy shall expire and terminate, except as herein provided. No contract, alteration or discharge of contracts, waiver of forfeitures, or granting of permits or credits shall be valid unless the same shall be in writing, signed by the president or vice-president and one other officer of the company."

(D) "Grace in Payment of Premiums.

IV. A grace of thirty days, during which the policy remains in full force will be allowed in payment of all premiums, except the first, subject to interest charge at the rate of five per cent per annum."

5. That none of the provisions, agreements or conditions in said written application and policy of assurance contained were at any time altered, waived or in any way changed or modified.

6. That the said first premium of $381.80 referred to in said written application and in said policy of assurance was never paid in cash according to the terms of said written application and policy of assurance.

7. That the receipt of this defendant for said first premium, on its authorized form, signed by its treasurer, was never issued or made by this defendant as provided in said written application and policy of assurance.

8. That said policy of assurance was never delivered to said Frederick C. Dobler, or to any other person for him, by this defendant, as provided in said written application and policy of assurance.

9. That by reason of the matters and things aforesaid, said policy of assurance did not at any time take effect, never was in force, nor did this defendant incur liability thereunder.

For further answer and as a second affirmative defense to plaintiff's alleged cause of action, this defendant says:

1. That on or about the 20th day of October, 1902, one Frederick C. Dobler applied to this defendant for a policy of assurance in the sum of $10,000.00 upon his life, the beneficiary in said policy to be his mother, Priscilla Dobler. That said application was in writing, duly

signed by said Frederick C. Dobler and said Priscilla Dobler.

2. That by the terms of said written application it was, among other things, expressly provided and agreed:

"I hereby agree that the answers and statements contained in parts I and II of this application, by whomsoever written, are warranted to be full, complete, material and true, and that this agreement, together with this application, are hereby made a part of any policy that may be issued hereon; that if any of the answers or statements made are not full, complete and true, or if any condition or agreement shall not be fulfilled as required herein or by such policy, then the policy issued hereon shall be null and void, and all money paid thereon shall be forfeited to said company; that the person soliciting or taking this application, and also the medical examiner, shall be the agents of the applicant as to all statements and answers in this application, and no statement or answers made or received by any person, or to the company, shall be binding on the company, unless such statements or answers be reduced to writing and contained in this application; that the principles and methods employed by the company in any distribution of surplus, apportionment of profits or costs belonging to any policy that may be issued hereunder are accepted and ratified by and for every person who shall have or claim any interest in the contract. And I hereby expressly waive all provisions of law now existing or that may hereafter exist, preventing any physician

from disclosing any information acquired in a professional capacity or otherwise, or rendering him incompetent as a witness in any way whatever, and for myself and for any other person accepting or acquiring any interest in such policy, authorize and request any such physician to testify concerning my health and physical condition. I further agree not to use alcoholic or malt liquors to excess, or habitually use opium, hydrate of chloral or other narcotics (tobacco excepted); and that under no circumstances shall the assurance hereby applied for be in force or the company incur any liability hereunder until the actual payment in cash of the first premium, while I am in good health, in exchange for a receipt on the company's authorized form, signed by its treasurer, and then only in accordance with the terms of said receipt and after the application shall have been received and approved by the Company at its home office and a policy actually issued hereon.

And I further expressly warrant that I have read the questions and answers contained in this application in parts I and II hereof, and each and all of them, and that said answers and each and all of them are my answers.

And I do further expressly warrant that I have not, nor has any one on my behalf, made to the agent or medical examiner, or to any other person, any answers to the questions contained in this application other than or different from the written answers as contained in this application.

And I do further expressly warrant that I have not, nor has any one on my behalf, given to the agent or medical examiner, or to any other person, any information or stated any facts, in any way contradictory of or inconsistent with the truth of the answers as written in this application in parts I and II hereof, and each and every one of the same, it being distinctly and specifically understood and agreed that the validity of any policy to be issued hereon is and shall be dependent upon the truth or falsity of the written answers contained in this application in parts I and II hereof, to the questions therein propounded."

3. That in and by said written applications said Frederick C. Dobler in answer to the following questions made the following answers, to wit:

Question.

2. A. State fully your occupation, employment or trade, and if more than one, state them all and duties.

B. How long have you been so engaged?

Answer.

A. Mining Supt., Cornucopia Mines of Oregon.

B. Five years.

That said Frederick C. Dobler thus stated, as a part of said written application, that he had been engaged and employed as a mining superintendent for five years. That as defendant is informed and believes this statement and answer of Frederick C. Dobler was not full, complete and true, but that in truth and in fact said Frederick C. Dobler had, at the time of making said

written application, been engaged and employed as such mining superintendent for less than one year.

4. That in and by said written application said Frederick C. Dobler in answer to the following questions made the following answers, to wit:

Question.

10. Have you now any assurance on your life?

If so, where, when taken, for what amounts and what kinds of policies?

Have you any other assurance?

Answer.

Name of company or association; date issued; amount.

5000. Washington; Life; Combination Bond; May, 1900; 5000.

None.

That said Frederick C. Dobler thus stated as a part of said written application that the only assurance he had then upon his was a combination bond of $5,000.00 in the Washington Life, and that he had no other assurance. That as defendant is informed and believes these statements and answers of said Frederick C. Dobler were not full, complete and true, but that in truth and in fact said Frederick C. Dobler then had other and additional assurance than the $5,000.00 Combination Bond in the Washington Life referred to by him, to wit, a policy of $5,000.00 in the Travelers' Insurance Company of Hartford, and a policy of $1,000.00 in said Travelers' Insurance Company.

5. That in and by said written application said Frederick C. Dobler in answer to the following questions made the following answer, to wit:

Question.

13. A. When did you last consult a physician and for what reason?

B. Give name and address of last physician consulted?

Answer.

A. Do not remember, years ago.

That as defendant is informed and believes these answers and statements of said Frederick C. Dobler were not full, complete and true, but that in truth and in fact said Frederick C. Dobler had, within the five years immediately preceding the date of said written application, at frequent intervals consulted and been attended by a physician.

6. That in and by said written application said Frederick C. Dobler in answer to the following questions made the following answers, to wit:

Question.

14. A. How long since you last consulted, or were attended by a physician? Give date?

B. State name and address of such physician.

C. For what disease or ailment?

D. Give name and address of each and every physician who has prescribed for or attended you within the past five years, and for what diseases or ailments and date.

E. Have you had any illness, disease or medical attendance not stated above?

Answer.

A. Do not remember; long time ago.

B. Name. Address.

C.

D. Name. Address.

That as defendant is informed and believes these answers and statements of said Frederick C. Dobler were not full, complete and true, but that in truth and in fact said Frederick C. Dobler, had, within the last five years immediately preceding the date of said written application, at frequent intervals consulted and been attended by a physician.

7. That by the express terms of said written application it was further provided and agreed, as follows, to wit:

"I do hereby agree and warrant, that the foregoing answers written to the above questions, are my answers, and are full and complete, correct and true and that the same shall be made a part of my application for policy of assurance, in the Mutual Reserve Life Insurance Company, and that I am the person who signed part I of this application to said company.

"And I do hereby repeat as to the foregoing answers contained in part II of this application each and every warranty and agreement contained and recited at the end of part I hereof.

Signature of Applicant:

F. C. DOBLER."

8. That thereafter and on or about the 7th day of November, 1902, upon receipt of said written application, this defendant made out its certain policy of assurance upon the life of said Frederick C. Dobler in accordance with said written application, being policy No. 1,004,047, a copy of which is set out in plaintiff's complaint herein.

9. That by the terms of said policy of insurance it was, among other things, expressly provided and agreed as follows:

"This policy of assurance witnesseth that in consideration of the application herefor, hereby made a part of this contract, and of three hundred and eighty-one dollars and eighty cents to be actually paid in cash as a first premium on or before the delivery hereof, Mutual Reserve Life Insurance Company promises to pay ten thousand dollars to Priscilla Dobler of Sumner, County of Pierce, State of Washington, if living at the time of the death of Frederick C. Dobler of Cornucopia, County of Baker, State of Oregon herein called the assured (otherwise, to the executors or administrators of the assured), subject to evidence of the death of said assured within one year from date hereof."

10. That by reason of said incomplete, false and untrue statements and answers of said Frederick C. Dobler in response to the questions asked him in said written application, the said policy of assurance No. 1,004,047, by the express terms of said written application and

said policy of assurance, became and was null and void and of no force nor effect whatever.

PARSONS, PARSONS & PARSONS,
Attorneys for Defendant.

State of Washington,
County of Pierce. } ss.

E. L. Parsons, being first duly sworn, says: That he is one of the attorneys for the defendant in the above-entitled action, has read the foregoing answer, knows the contents thereof and believes the contents to be true. That he makes this verification in behalf of said defendant corporation and for the reason that none of the officers of said defendant corporation are now within the State of Washington.

E. L. PARSONS.

Subscribed and sworn to before me this 23d day of December, 1903.

FRANK ALLYN, Jr.,
Notary Public in and for the State of Washington, Residing at Tacoma.

[Endorsed]: Received a copy of the within answer this 26th day of December, 1903.

S. WARBURTON,
By S. E. W.,
Attorney for Plaintiff.

Filed U. S. Circuit Court, District of Washington, Jan. 13, 1904. A. Reeves Ayres, Clerk, Saml. D. Bridges, Deputy.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.
No. 970.

Reply.

Comes now the above-named plaintiff and for reply to the answer of the defendant herein.

I.

Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of defendant's first affirmative defense.

II.

Denies the allegations contained in paragraph V of defendant's first affirmative defense.

III.

Denies the allegations contained in paragraph VI of defendant's first affirmative defense and on the contrary alleges that said premium of $381.80 was paid to defendant company.

IV.

Denies the allegations contained in paragraphs VII and IX of defendant's first affirmative defense.

V.

Denies the allegations contained in paragraph VIII of defendant's first affirmative defense and on the contrary alleges that said policy was delivered to said Frederick C. Dobler at or about the time of the issuance of the same.

In reply to the allegations contained in the defendant's second affirmative defense, plaintiff.

I.

Denies that plaintiff has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of defendant's second affirmative defense.

II.

Denies that plaintiff has any knowledge or information sufficient to form a belief as to whether said written application contained the questions and answers in paragraph III set forth of defendant's second affirmative defense. Plaintiff alleges that if said Frederick C. Dobler did make answers to the questions set forth in paragraph III that they were true, full and complete.

Plaintiff denies each and every other allegation in said paragraph III contained.

III.

Denies that she has any knowledge or information sufficient to form a belief as to whether the questions

and answers set forth in paragraph IV of defendant's second affirmative defense were contained in the application for the policy of insurance in question. In answer to the other allegations in said paragraph LV contained, plaintiff alleges that at the time of the application and at the date of the issuance of the policy said Frederick C. Dobler had no other assurance on his life other than the policy of $5000.00 in the Washington Life Insurance Company and that if said Frederick C. Dobler did make answers to said questions in said paragraph IV set forth, the same were full, true and complete; plaintiff admits that at the time of the application for said policy said Frederick C. Dobler was carrying $5000.00 of what is termed purely accident insurance, in the Travelers' Insurance Company of Hartford, Connecticut; that alleged question 10, as contained in the alleged application did not call for disclosure of accident insurance.

Plaintiff denies each and every other allegation in said paragraph IV contained.

IV.

Denies that she has any knowledge or information sufficient to form a belief as to whether the application for said insurance contained the questions and answers in paragraph V of defendant's second affirmative defense.

Plaintiff further alleges that if said application contained the questions and answers set forth that the same were answered true and correctly. Plaintiff de-

nies each and every other allegation in said paragraph V contained.

V.

Plaintiff denies that she has any knowledge or information sufficient to form a belief as to whether the application contained the questions and answers in paragraph VI of defendant's second affirmative defense contained.

Plaintiff further alleges that if said application contained the questions and answers set forth in said paragraph VI the same were true and correct. Plaintiff denies each and every other allegation in said paragraph VI contained.

VI.

Plaintiff denies that she has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph VII of defendant's second affirmative defense.

VII.

Plaintiff admits that defendant issued policy # 1,004,047 but denies that she has any knowledge or information sufficient to form a belief as to whether the same was written in accordance with application mentioned in paragraph VIII of defendant's second affirmative defense.

VIII.

Plaintiff denies each and every allegation contained in paragraph X of defendant's second affirmative defense.

FIRST AFFIRMATIVE REPLY TO DEFENDANT'S FIRST AFFIRMATIVE DEFENSE.

As a first affirmative reply to the allegations contained in the first affirmative defense of the defendant, plaintiff says:

I.

That at the time of the making and delivery of said contract of insurance as set forth in plaintiff's complaint, said Frederick C. Dobler gave to defendant's duly authorized agent, a note in payment of one-third of the first year's premium, to wit, a note in the sum of $127.26, all in accordance with agreements and conditions contained in said policy of insurance; that the same was thereupon forwarded to the defendant company at its home office in New York, which defendant company accepted and still retains as payment of one-third of said premium; that the balance of said first year's premium was paid by insured, Frederick C. Dobler by making, executing and delivering his note in the sum of $254.54 payable in sixty days to defendant's agent, William Hyde Stalker for and on behalf of said defendant company; that on December 29, 1902, said Frederick C. Dobler paid the sum of $154.54 on said note; said sum was so endorsed thereon; that on the 17th of February, 1903, said Frederick C. Dobler paid the balance of said note, to wit, the sum of $101.60; that said note was then canceled and delivered to said Frederick C. Dobler as fully paid; that shortly after said date, its agent, William Hyde Stalker remitted said amount remaining due on said premium to defendant

company, which accepted the same in full payment of said first annual premium.

II.

That said William Hyde Stalker was the duly appointed agent of said defendant company and had been such for several months prior to the issuance of said policy in question; that notwithstanding the terms and conditions of said policy of insurance set forth in defendant's answer and complaint of plaintiffs, defendant company authorized said William Hyde Stalker to accept notes in payment of first premiums on policies solicited by and applications received through him; that it was the custom and practice of said William Hyde Stalker to accept notes in payment of first premiums on policies solicited by and delivered through him; that said William Hyde Stalker solicited the policy in question and delivered the same to said Frederick C. Dobler. That this custom and practice of said William Hyde Stalker was well known to defendant company and acquiesced in and ratified by it.

SECOND AFFIRMATIVE REPLY TO FIRST AFFIRMATIVE DEFENSE.

That defendant ought not to be permitted to make the defense on the grounds set forth in the first affirmative defense for the reasons:

I.

That prior to the 17th day of February, 1903 and again on the 16th day of March, 1903, defendant was informed and well knew that William Hyde Stalker, its agent

who solicited the policy of insurance in question and who was authorized to deliver the policy to Frederick C. Dobler, had accepted a premium note for one-third of the first premium on said policy; that he had accepted in payment of the balance of the first premium on said policy a note for $254.54 payable to William Hyde Stalker sixty days from date; that defendant well knew that said Frederick C. Dobler had paid $154.54 on said note on the 20th day of December, 1902, and that he had paid the balance of said note, $101.60, on the 17th day of February, 1903.

II.

That said defendant with full knowledge of all of said facts above mentioned, on the —— day of April, 1903, furnished plaintiff with blank proofs of death to be executed, one part by the plaintiff, second part by a physician, if, any, who had attended Mr. Dobler, third part by the undertaker who prepared the body of Frederick C. Dobler for burial, fourth part by a friend of said Frederick C. Dobler, each part to be verified by the party making the same, on oath before a notary public. That said defendant company made no suggestion that it would resist the payment of said policy, but on the other hand led plaintiff to believe, and she did believe that by complying with defendant's request said policy would be paid.

III.

That plaintiff fully believing that defendant company intended to pay the policy in full and fully believing that it had no defense to the payment of said policy and

in full reliance thereon and great cost and labor to herself, caused the said proofs of death to be fully executed in full compliance with the requirements of said defendant company. That by reason of said facts defendant is hereby estopped from insisting on the defense contained in the first affirmative defense.

FIRST AFFIRMATIVE REPLY TO SECOND AFFIRMATIVE DEFENSE.

That defendant ought not to be permitted to defend on the ground that Frederick C. Dobler did not make full, complete and true answer to alleged question 10 in that he had $5,000.00 accident insurance in the Travelers' Insurance Company of Hartford, Connecticut, for the reasons:

I.

That one William Hyde Stalker was the duly authorized and appointed agent of defendant company with full powers of a general agent; that at the time of the taking of said application for insurance said William Hyde Stalker was informed by Frederick C. Dobler that he then was carrying $5000.00 accident insurance in the Travelers' Insurance Company of Hartford, Connecticut; that said accident policy was written for the term of one year and would expire at the end of a year. That said Frederick C. Dobler inquired of said William Hyde Stalker whether the question called for and required him to state what accident insurance he was carrying; that said William Hyde Stalker informed said Frederick C. Dobler relying on the opinion and statement of

said William Hyde Stalker and believing that the said question did not call for a statement or disclosure of the accident insurance he was carrying, omitted to mention the same. That said William Hyde Stalker wrote in his own hand the answers to all the questions contained in the application for said insurance and being informed of the facts, framed the answers thereto in his own language, stating to said Frederick C. Dobler that the answers he wrote to the questions propounded were the proper answers to make of the facts as stated to him by said Frederick C. Dobler.

II.

That prior to the issuance of said policy of insurance the defendant company was fully informed and well aware of the fact that Frederick C. Dobler was carrying $5,000.00 accident insurance in the Travelers' Insurance Company of Hartford, Connecticut.

SECOND AFFIRMATIVE REPLY TO DEFENDANT'S SECOND AFFIRMATIVE DEFENSE.

For further reply and as a second affirmative reply to defendant's second affirmative defense, plaintiff says:

I.

That defendant ought not to be permitted to defend on the grounds set forth in defendant's second affirmative defense and especially ought not to be permitted to defend on the ground that Frederick C. Dobler's answer to the question set forth in paragraph IV was not complete, full and true in that he was carrying $5,000.00 accident

insurance in the Travelers' Insurance Company of Hartford, Connecticut, for the reason that prior to April 17th, 1903, defendant company was fully aware of the fact that at the time of the making of the application for said policy of insurance by said Frederick C. Dobler and at the time of the issuance of the policy in question said Frederick C. Dobler was carrying $5,000.00 accident insurance in the Travelers' Insurance Company of Hartford, Connecticut. That defendant with full knowledge of said fact and with full knowledge of all the matters and things set forth in defendant's second affirmative defense, on the 17th day of April, 1903, furnished plaintiff with blank proofs of death to be executed one part by the plaintiff, second part by the physician who attended Frederick C. Dobler, if any, third part by the undertaker who prepared the body of said Frederick C. Dobler for burial and fourth part by a friend of said Frederick C. Dobler, each part to be verified by the party making the same on oath before a notary public.

That said defendant company made no suggestion that it has any defense to the payment of said policy or that it expected to resist the payment of the same, but on the contrary led plaintiff to believe and she did believe that by complying with defendant's request said policy would be paid. That plaintiff, fully believing that defendant company intended to pay the policy in full, and fully believing that it had no defense to the payment of said policy, and in full reliance thereon and at a great cost and labor to herself caused the said proofs of death to be fully executed in full compliance with the require-

ments of said defendant company. That said proofs of death disclosed the fact that at the time of issuance of said policy of insurance that said Frederick C. Dobler was carrying $5,000.00 accident insurance in the Travelers' Insurance Company of Hartford, Connecticut. That after the receipt of said proofs of death, with full knowledge of all the facts stated therein, defendant without any suggestion that it intended to resist the payment of said policy of insurance, required defendant, at great cost and labor to herself, to furnish said company with additional proofs of death; that said defendant company led plaintiff to believe and she did believe that by complying with defendant's request for further and additional proofs that the company would pay the said policy; that thereupon plaintiff fully complied with defendant's requirements for additional proofs.

Wherefore, plaintiff asks for judgment in accordance with the prayer of the complaint.

S. WARBURTON,
Atty. for Plaintiff.

State of Washington,
County of Pierce.

Priscilla Dobler, being first duly sworn, on oath deposes and says, that she is the plaintiff above named; that she has read the within and foregoing reply, knows the contents thereof and the same are true as she verily believes.

PRISCILLA DOBLER.

Subscribed and sworn to before me this 1st day of June, A. D. 1904.

CHARLES O. BATES,

Notary Public Residing at Tacoma in said County and State.

[Endorsed]: Filed June 1st, 1904. A. Reeves Ayres, Clerk.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,

vs.

THE MUTUAL RESERVE LIFE INSURANCE COMPANY.

No. 970.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff in the sum of $10,127.26 with interest from July 17, 1903.

(Signed) RALPH METCALF,

Foreman.

[Endorsed]: Filed U. S. Circuit Court, District of Washington, July 25, 1904. A. Reeves Ayres, Clerk. Saml. D. Bridges, Deputy.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY OF NEW YORK.
Defendant.
No. ——.

Judgment.

The above cause having come on for trial on the 25th day of July, A. D. 1904, and the jury having been regularly impaneled and the Court having heard the proofs and allegations of the parties, Stanton Warburton & John H. McDaniels, appearing for the plaintiff, and Parsons, Parsons & Parsons appearing for the defendant and the case having been submitted to the jury upon the instructions of the Court and the allegations of the parties, and the jury having retired to consider the evidence and having returned a verdict in open court in favor of the plaintiff and against the defendant in the sum of $10,127.26, together with interest at the rate of six per cent per annum from the 17th day of July, 1903, and now upon the application of the plaintiff for judgment.

It is ordered, considered and adjudged that the plaintiff Priscilla Dobler do have and recover from the defendant Mutual Reserve Life Insurance Company of New York,

the full sum of ten thousand seven hundred and forty-seven and 54/100 ($10,747.54) dollars in lawful money of the United States together with interest from the 26th day of July, 1904, at the rate of six per cent per annum, together with her costs and disbursements in this action to be taxed by the clerk.

To the rendering of the foregoing judgment defendant duly excepts and exception is allowed by the Court.

Dated July 26th, A. D. 1904.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed U. S. Circuit Court, District of Washington, Jul. 26, 1904. A. Reeves Ayres, Clerk.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER, Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, Defendant. } No. 970.

Order Extending Time to File Bill of Exceptions.

On reading and filing the stipulation herein, there appearing good cause therefor—

It is ordered that the defendant have up to and including the twenty-seventh day of August, 1904, in which to

prepare, serve and file its bill of exceptions in the above action.

Dated July 28th, 1904.

JOHN J. DE HAVEN,
Presiding Judge.

[Endorsed]: Filed U. S. Circuit Court District of Washington, July 28, 1904. A. Reeves Ayres, Clerk. Saml. D. Bridges, Deputy.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER, Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, Defendant.
No. 970.

Motion for New Trial.

Comes now the defendant Mutual Reserve Life Insurance Company, by Parsons, Parsons & Parsons, its attorneys, and upon the record and files herein and on the minutes of the court, moves the Court that the verdict and judgment heretofore rendered and entered herein be vacated and that a new trial of this action be had, upon th following grounds:

1. Error in the assessment of the amount of recovery in that the verdict is excessive.

2. Insufficiency of the evidence to justify the verdict.

3. That the verdict is not supported by the evidence.

4. That the verdict is against the evidence and the law.

5. Error in law occurring at the trial and excepted to at the time by the defendant.

Dated, July 27th, 1904.

PARSONS, PARSONS & PARSONS,
Attorneys for Defendant.

Received a copy of the foregoing motion at Tacoma, Washington, this 27th day of July, 1904.

S. WARBURTON and
J. H. McDANIELS,
Attorneys for Plaintiff.

[Endorsed]: Filed July 28th, 1904. A. Reeves Ayres, Clerk.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER, Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY OF NEW YORK. Defendant.
No. 970.

Order Denying Motion for New Trial.

This cause coming on to be heard this 28th day of July, 1904, upon the motion of the defendant for a new trial, the parties appearing by their respective counsel, and

the Court having heard the argument of counsel and being now advised in the premises—

It is ordered that said motion be, and the same is hereby denied, to which ruling defendant excepts and its exception is allowed by the Court.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed U. S. Circuit Court, District of Washington, July 28th, 1904. A. Reeves Ayres, Clerk. Saml. D. Bridges, Deputy.

(Copy of Cover:)

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY,
Defendant,
No. 970.
Original.

BILL OF EXCEPTIONS.

Filed U. S. Circuit Court, District of Washington, Aug. 26, 1904. A. Reeves Ayres, Clerk. Saml. D. Bridges, Deputy.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK,
Defendant.
No. 970.

Bill of Exceptions.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK,
Defendant.
No. 970.

Transcript of Testimony.

Be it remembered, that heretofore, and on, to wit, July 25th, A. D. 1904, the above-entitled cause came regularly on for trial, before the Honorable JOHN J. DE HAVEN, District Judge presiding in said United States Circuit Court within and for the District of Washington for the Western Division, sitting with a

jury which was duly impanelled and sworn to try said cause.

The plaintiff herein appearing by Stanton Warburton, Esq., and John H. McDaniels, Esq., her attorneys, and the defendant herein appearing by Messrs. Parsons, Parsons & Parsons, its attorneys.

Whereupon, the following proceedings were had and done, and the following witnesses sworn upon behalf of the parties hereto respectively, the following testimony given, and the following objections, motions and rulings were made, and the exceptions thereto noted were taken and allowed, to wit:

WILLIAM DOBLER, a witness on behalf of plaintiff, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. WARBURTON.)

Q. What is your name?

A. William Dobler.

Q. What relation, if any, do you bear to the plaintiff? A. He is my son.

Q. The plaintiff in this case?

A. The plaintiff in the case is my wife.

Q. How long has she been your wife?

A. We were married in 1868.

Q. When did you come to this country?

A. In 1888.

Q. You may state whether or not you are a resident of this State?

(Testimony of William Dobler.)

A. Yes; I am a resident of this State.

Q. Are you a citizen of this State?

A. Yes, sir.

Q. Is Mrs. Dobler a resident of this State?

A. Yes, sir.

Q. What relation, if any, did you bear to Frederick C. Dobler? A. He is my son.

Q. Is your son, Frederick C. Dobler, dead?

A. Yes, sir, he is.

Q. When did he die?

A. Died the 3d day of March, 1903; that is, I was informed he died then; I saw him the 5th day of March; saw his corpse.

Q. How was he killed?

A. Killed in a snow slide in Cornucopia, Oregon.

Q. Did you examine his effects after his death, papers, etc.? The property, papers, etc., of the deceased after his death? A. His papers?

Q. Yes, sir.

A. I got hold of his papers, secured them out of his safe out of the office of the Cornucopia mine, a month after he was dead.

(Insurance policy marked Plaintiff's "A.")

The COURT.—That is admitted; there is no use of wasting time on that. That is the policy of insurance.

Mr. WARBURTON.—We only offer it on denial of the delivery.

(Testimony of William Dobler.)

The COURT.—Of course, you have to show it has been executed and delivered; but I did not understand there was any denial but that it was delivered.

Mr. PARSONS.—If your Honor please, the policy recites on its face that the application is made a part thereof. The application under that is not admitted; and I think the entire contract should be in evidence. Of course, the policy is a part of that.

Mr. WARBURTON.—I don't think it is necessary or incumbent upon us to introduce the application; and the only purpose I had offered the policy is to show delivery; and I presume it must follow—

The COURT.—Very well. Proceed.

Q. Did you find that among his papers?

The COURT.—Just introduce it in evidence.

Mr. PARSONS.—The only objection to the offer is it is objected to unless the application which is referred to is introduced with it; and defendant now produces the original application and offers the same to counsel for plaintiff.

The COURT.—Let them both go in.

Mr. WARBURTON.—The only change that will make is in the order of proof.

Mr. PARSONS.—There is the application (handing paper to counsel for plaintiff). I also will ask that these original papers which are now introduced may be

(Testimony of William Dobler.)

afterwards withdrawn and copies substituted, if there is no objection.

Mr. WARBURTON.—No objection. I doubt whether this application is admissible for the reason it shows upon its face that it has not all of the original paper attached to it; it has been torn off, a part of it. I will hand it to your Honor for examination, and you can examine it. No objection to the application being introduced if it is really the application. You will notice it has been torn off there at the bottom. Of course, I don't know what is on there; and of course, Mr. Frederick Dobler is dead, and we have no means of knowing.

Mr. PARSONS.—That is the entire application. The signature you will notice on the third page is attached to the bottom of the page and that is as a matter of fact the entire paper.

The COURT.—Let it be admitted.

(Plaintiff's Exhibit "A," being Policy of Insurance, admitted in evidence and marked as such Plaintiff's Exhibit "A.")

(Plaintiff's Exhibit "B," being application of Frederick C. Dobler for policy of insurance, admitted in evidence and marked as such Plaintiff's Exhibit "B.")

Q. I think you have sworn that Frederick C. Dobler was the son of Mrs. Dobler, the plaintiff?

A. Yes, sir.

Q. And that she is still alive? A. Yes, sir.

(Testimony of William Dobler.)

Q. Mr. Dolber, did you ask the defendant company, in writing, by letter, for blank proofs of death?

A. Well, sir, I give instructions to Mr. Levins to notify them.

Q. Did you receive blank proofs of death to be filled out and forwarded by your wife? A. Yes, sir.

The COURT.—Is there any dispute about that fact?

Mr. PARSONS.—About the blanks being furnished? No, your Honor, there is no dispute about that.

The COURT.—Let it be admitted, then; let us get down to the vital matters, if we can.

Mr. PARSONS.—I will say that blank proofs were furnished accompanied by a letter stating certain matters.

Mr. WARBURTON.—That is the reason I wanted the letter. I think we can agree what the letter is, so that we can ask questions without introducing it at this time.

Q. Did you receive a letter from the company accompanying the blanks?

A. Well, my wife did receive a letter.

Q. Your wife did? A. Yes, sir.

Q. Did the Mr. Cameron mentioned in that letter come to see you at Puyallup?

A. I understood he came to the house. I was at Baker City at the time he came to the house.

Q. Did you see him afterwards?

(Testimony of William Dobler.)

A. Yes, sir, I saw him afterwards here, after I come back.

Q. You may state what conversation occurred between you and Mr. Cameron, the agent?

A. Well, sir, as near as I can recollect, Mr. Cameron wanted to make a settlement; wanted to give back the premiums.

Q. Had the company made any flat denial of liability up to that time?

A. They did in their letter, that is, that they would not—they did not see fit to allow the claim in their letter, and that Mr. Cameron would be here and adjust the matter.

Q. When Mr. Cameron came, did he deny liability upon the part of the company?

A. Yes, sir, he denied liability; said they would not pay.

Q. You say the company sent you blank forms of proof of death? A. Yes, sir.

Q. Were they filled out and sent to the company?

A. They were filled out and sent back.

Q. State whether after the company received these proofs of death, they asked for other or additional proofs? A. Yes, sir, they did.

Q. What did they ask for, as near as you can recollect? A. They asked for proof—

Mr. PARSONS.—Is that in writing?

(Testimony of William Dobler.)

Mr. WARBURTON.—Yes.

Mr. PARSONS.—The writing is the best evidence; and I will object to this without the writing being introduced.

The COURT.—Produce the writing.

Q. Was the request for additional proofs in a paper separate from the paper you had returned to the company? A. It came by itself; yes, sir.

Q. Was there any letter accompanying it?

A. I don't recollect there was.

The COURT.—Have you any letter?

The WITNESS.—No, sir.

Q. I asked you whether there was a letter accompanied it? A. I don't recollect there was.

Q. It contained what?

A. It contained a paper.

The COURT.—Have you this paper?

Mr. WARBURTON.—Yes, sir; it will appear that they sent a blank form to be filled out—

The WITNESS.—It was a blank form for the beneficiary to fill out. There was no one else signed it only the beneficiary, my wife.

Q. What did you do with that?

A. I returned it to them after it was properly filled out.

Q. Did it require a notary's certificate?

(Testimony of William Dobler.)

A. No, sir, didn't require no clerk of the court, all it required was a notary seal.

Mr. WARBURTON.—Have you that additional proof here?

Mr. PARSONS.—No, sir.

Mr. WARBURTON.—I asked for it in New York and they could not produce it there, and Mr. Parsons says he cannot produce it here, so we are unable to show exactly what it contained except what he recollects.

Mr. PARSONS.—I will say that this is the first notice I have had or any request for this paper, and the first I have heard of it.

Mr. WARBURTON.—It is in the reply.

The COURT.—Well, proceed with the witness.

Mr. WARBURTON.—I think that is all I have of this witness.

Cross-examination.

(By Mr. PARSONS.)

Q. This last paper you referred to, do you remember when it was received; was it received by you?

A. Sir?

Q. This last paper you have referred to, was it received by you personally?

A. They were sent—well, I couldn't say whether it was sent in my name or in the name of my wife, but I went and got a notary to execute it and put a seal on it.

(Testimony of William Dobler.)

Q. I understood you to say it did not require a notary seal?

A. It did require the notary seal, but didn't require no certificate of Court.

Q. When was it received?

A. It was received about the time I expected to hear from them when I would hear from them. I was looking to hear from them every day, and all at once this paper showed up to be filled up by the beneficiary.

(Testimony of witness closed.)

Mr. WARBURTON.—I offer in evidence the deposition of WILLIAM H. STALKER, a witness on behalf of plaintiff, which deposition was taken on stipulation between counsel for the parties, but without reading the stipulation, I will read the questions and answers:

(Said stipulation being in words and figures following, to wit):

(Title).

It is hereby stipulated and agreed between the above-named plaintiff and the above-named defendant by their respective attorneys that the deposition of William Hyde Stalker may be taken at Boise City, Idaho, or any convenient place in that vicinity, on the 28th day of June, A. D. 1904, before R. E. Yeager, a notary public, or such day subsequent as the said R. E. Yeager may adjourn such hearing, the said parties hereby waiving all preliminary notice, commission and other forms; said deposition to be read in evidence by the plaintiff

(Deposition of William H. Stalker.)

or defendant on the trial of the above cause; said deposition to be taken by written interrogatories hereto annexed.

It is further agreed that said deposition may be read at the trial subject only to the objections of the competency, relevancy and materiality of the testimony of said witness, said deposition to be executed and returned to the above-named court as prescribed by the practice and procedure under the laws regulating the practice of this Court and said commissioner shall have all the power and authority that he would have in the premises were he duly commissioned to take the deposition in said cause under the order of this Court.

It is further stipulated that there will be attached to this deposition and returned as a part of it any further or cross interrogatories to be propounded to witness on behalf of defendant that may reach S. Warburton at said Boise City before the deposition is taken.

(Signed) S. WARBURTON,
Attorney for Plaintiff.

(Signed) PARSONS, PARSONS & PARSONS,
Attorneys for Defendant.

Interrogatory No. 1: State your age, residence and present occupation?

A. Boise, Idaho. Insurance solicitor. Age, 33.

Interrogatory No. 2: If in answer to Interrogatory 1, you state you are an agent for a life insurance company, state how long you have been engaged in that business?

(Deposition of William H. Stalker.)

A. Have been engaged in life insurance business since 1901.

Interrogatory No. 3: Were you acting as agent for the Mutual Reserve Life Insurance Company of New York during the month of October, 1902?

A. Yes.

Interrogatory No. 4: If you answer the preceding question in the affirmative, give the dates when you began working for said company and the date when you ceased.

A. I cannot give the exact dates, but to the best of my recollection, I began about October, 1902, and ceased working for that company about May or June, 1903.

Interrogatory No. 5: State whether or not about the 20th day of October, 1902, you solicited and received from one Frederick C. Dobler an application for a policy of insurance issued by The Mutual Reserve Life Insurance Company of New York City?

A. Yes.

Interrogatory No. 6; State if you know who delivered the policy of insurance issued on application of said Frederick C. Dobler, mentioned in foregoing interrogatory, and who collected the first premium thereon, being Policy No. 1,004,047.

A. I did. I sent the policy to him through the mails and received a letter from him acknowledging receipt of same. Mr. Dobler gave two notes in settlement; one of one-third of the premium, which was delivered to the

(Deposition of William H. Stalker.)

Mutual Reserve Life Insurance Company; the other two-thirds, amounting to $254.54 was delivered to me and placed by me in the First National Bank of Baker City, Oregon, for collection, which was finally paid.

Interrogatory No. 7: If in answer to the preceding interrogatory you state that you delivered said policy of insurance and collected the first premium, state in detail the manner and as near as possible the dates, if more than one, of the payment of said first premium?

A. I have practically answered this question by my answer to the preceding interrogatory. I may add that the entire note was paid before March 1st, 1903; there were one or more payments made before the note was taken up.

Interrogatory No. 8: If you collected the first premium, state whether or not you remitted the same to the Mutual Reserve Life Insurance Company of New York?

A. I was under contract with the Mutual Reserve Life Insurance Company on the basis of seventy per cent of first premium to be retained by myself. There was no understanding between myself and the company as to the time when net premium should be sent to the home office. I sent the money and notes to the company through their Supervisor of Agents, Mark T. Cady, of Portland, Oregon, in settlement for the net premium of Mr. Dobler's policy and several others.

(Deposition of William H. Stalker.)

Interrogatory No. 9: If so, state the manner and date of the remittance; if more than one, state particularly the date of the last remittance?

A. There was only one remittance, which bears date of March 4, 1903.

Interrogatory No. 10: If in answer to the preceding interrogatory you state that you made more than one remittance on the first premium, state whether you received a receipt for the last remittance, and if so, attach the same, if in your possession to your answers to these interrogatories, with proper mark of identification?

A. I received a receipt for the last remittance which I herewith hand the Commissioner and he marks the same exhibit "A."

The COURT.—Finish the deposition first and then read the exhibits.

Mr. WARBURTON.—All right. (Proceeding with the reading of the deposition:)

Interrogatory No. 11: If you have not the original receipt of the last remittance, but have a copy, attach the copy to your answer to these interrogatories, with proper mark of identification.

A. Is answered in No. 10.

Interrogatory No. 12: State whether or not if you know said Frederick C. Dobler, prior to his death, fully paid the said first premium on Policy of Insurance No.

(Deposition of William H. Stalker.)

1,004,047 issued by the Mutual Reserve Life Insurance Company of New York?

A. I did, and he did.

Interrogatory No. 13: Are you familiar with insurance terminology and the sense in which words and terms are employed in insurance parlance, particularly with reference to words, phrases and language used and employed in application for life insurance policies?

A. I am.

Interrogatory No. 14: If you answer the last question in the affirmative, state whether "accident insurance" is or is not included within the meaning of the term "assurance on life" as that term is used in the insurance business, or among insurance companies.

Mr. PARSONS.—Now, just a moment. Now, defendant objects to this as incompetent, irrelevant and immaterial, and an attempt to vary the terms of a written contract by parol; and upon the ground that the written contract between the parties is entirely clear and unambiguous, and this is merely an attempt by the witness to interpret the contract. We insist that it is the province of the Court to pass upon the construction of the contract, and in the absence of any ambiguity or uncertainty in the written contract, no parol evidence is admissible. This and the succeeding questions there I think will raise some of the very material questions of law which are involved in this case, and I would like at

(Deposition of William H. Stalker.)

some time during the trial of the case to be heard fully on those questions.

The COURT.—Do you claim that the policy does not mean what it says, or what do you claim?

Mr. WARBURTON.—I claim it means what it says.

The COURT.—If so, what authorities have you to cite?

Mr. WARURTON.—I may say that the authorities are contradictory to some extent as to whether the insurance mentioned in the application called for co-operative or accident insurance; some of the authorities holding squarely that it does not; and some holding that it does. Now, if there is any question or doubt about it, I think we have a right to show the custom and usage what is the meaning of the question and what information the question calls for under the customary meaning of this term in particular.

The COURT.—I will sustain the objection.

Mr. WARBURTON.—We reserve our exception.

Interrogatory No. 15: I call your attention to Question 10 contained in the application of Frederick C. Dobler, as follows: "Have you now any assurance on your life; if so, where, when taken, for what amounts, and what kind of policies? Have you any other assurance?" and ask you to state whether or not according to the practice, custom and understanding of insurance

(Deposition of William H. Stalker.)

men and companies, that the question 10 calls for a disclosure of accident insurance carried by the applicant?

Mr. PARSONS.—We make the same objection as before; incompetent, immaterial, and irrelevant, and an attempt to vary the terms of a written contract by parol; and on the ground that the written contract between the parties is entirely clear and unambiguous, and this is an attempt of the witness to interpret the contract, which is a matter within the province of the Court as to the construction of a contract, and in the absence of any ambiguity or uncertainty in the written contract, no parol evidence is admissible.

The COURT.—I will sustain the objection.

Mr. WARBURTON.—We reserve our exception.

Interrogatory No. 16: Are you familiar with the custom and practice of the defendant, the Mutual Reserve Life Insurance Company of New York, with regard to the character of assurance, a disclosure of which is called for in answer to said question 10 mentioned in the preceding interrogatory?

Mr. PARSONS.—We make the same objection as before; incompetent, immaterial and irrelevant, and an attempt to vary the terms of a written contract by parol; and on the ground that the written contract between the parties is entirely clear and unambiguous, and this is an attempt of the witness to interpret the contract which is a matter within the province of the

(Deposition of William H. Stalker.)

Court as to the construction of the contract and in the absence of any ambiguity or uncertainty in the written contract, no parol evidence is admissible.

The COURT.—Objection sustained.

Mr. WARBURTON.—We reserve our exception. I will read:

Interrogatory No. 17: If so, state whether according to the practice and custom of said defendant company, said question is understood or intended to be understood as calling for a disclosure of accident insurance or health insurance or either of them?

Mr. PARSONS.—We make the same objection as before—incompetent, immaterial and irrelevant, and an attempt to vary the terms of a written contract by parol; and on the ground that the written contract between the parties is entirely clear and unambiguous, and this is an attempt of the witness to interpret the contract which is a matter within the province of the Court as to the construction of the contract, and in the absence of any ambiguity or uncertainty in the written contract, no parol evidence is admissible.

The COURT.—Objection sustained.

Mr. WARBURTON.—We reserve our exception.

Interrogatory No. 18: If in answer to any of the preceding interrogatories you have stated that you solicited policy of insurance mentioned, state who wrote out the

(Deposition of William H. Stalker.)

answers to the questions contained in the application of parts 1 and 2?

Mr. PARSONS.—Now, we make the same objection to that question. It is entirely irrelevant who wrote out the answers to that application.

The COURT.—Objection sustained.

Mr. WARBURTON.—We reserve our exception.

Interrogatory No. 19: Did you assist Frederick C. Dobler in the preparation of said application; if so, how?

Mr. PARSONS.—We make the same objection to that interrogatory as to the others, incompetent, irrelevant and immaterial, and an attempt to vary the terms of a written contract by parol, and on the ground that the written contract between the parties is entirely clear and unambiguous, and this is an attempt on the part of the witness to interpret the contract which is a matter within the province of the Court as to the construction of the contract, and in the absence of any ambiguity or uncertainty in the written contract, no parol evidence is admissible.

The COURT.—Objection overruled.

Mr. PARSONS.—We reserve our exception.

A. I did. I instructed him as to the answers called for by the questions contained in the application on information furnished me by him, and informed him what the correct answers to such questions would be, on the information given me.

(Deposition of William H. Stalker.)

Mr. PARSONS.—I move to strike out the answer after that first part: I did. After that part.

The COURT.—I will grant the motion to strike out the answer.

Mr. WARBURTON.—We reserve our exception. That will go to No. 20 also.

Interrogatory No. 21: Did you assume to state and write out in correct language and proper form answers to questions in parts 1 and 2 or either of them upon the information given you by said Frederick C. Dobler?

Mr. PARSONS.—Objected to as incompetent, irrelevant and immaterial; and also as an attempt to vary the terms of a written contract by parol evidence.

The COURT.—Objection sustained.

Mr. WARBURTON.—We reserve our exception.

Interrogatory No. 22: Referring to question 10 in said application, part 1, were you aware and informed by Frederick C. Dobler at the time of preparing the application mentioned, that he, the said Frederick C. Dobler, was carrying $5,000.00 accident policy in the Travelers' Insurance Company of Hartford, Connecticut, state fully?

Mr. PARSONS.—Objected to for the same reason as before; incompetent, irrelevant and immaterial; and also as an attempt to vary the terms of a written contract by parol evidence.

(Deposition of William H. Stalker.)

The COURT.—Well, I will let that go in temporarily; I will have to consider whether that was irrelevant or not. I am not prepared to rule definitely on that at this moment. You can move to strike it out later.

A. I was. He told me that he was carrying $5,000 accident insurance in the Travelers' Insurance Company of Hartford, Connecticut, and he also called my attention to a policy for $1,000 accident insurance that he carried in another company (the name of which I do not remember). I was also aware of the fact that he carried a $5,000.00 in the Washington Life of New York; he took particular pains to explain to me all his business affairs in connection with insurance. I told him that the $5,000 accident insurance, likewise the $1,000 accident policy was not called for in answer to question 10 in application of Mutual Reserve Life Insurance Company.

Mr. WARBURTON.—I think I can sustain my right to that question and answer by authorities.

The COURT.—That may stand, subject to a motion to strike out.

Interrogatory No. 23: If your answer to the preceding interrogatories discloses that you wrote in the answer in the application part 1, state whether or not it was understood between you and the said Frederick C. Dobler that the answers so written in by you were full, true, and complete answers to the respective questions

(Deposition of William H. Stalker.)

according to the information given you by said Frederick C. Dobler?

Mr. PARSONS.—We renew the same objection; incompetent, irrelevant and immaterial; and an attempt to vary the terms of a written contract by parol evidence.

The COURT.—Objection sustained.

Mr. WARBURTON.—We reserve our exception.

Interrogatory No. 24: State whether according to the custom and practice of the defendant company the answers so written in said application by you particularly in part 1 were full, true and correct according to the information given you at said time by Frederick C. Dobler?

Mr. PARSONS.—We make the same objection to that; incompetent, irrelevant and immaterial; and an attempt to vary the terms of a written contract by parol evidence.

The COURT.—Objection sustained.

Mr. WARBURTON.—We reserve our exception.

Interrogatory No. 25: State whether or not you were authorized by defendant company to accept notes in payment of first premiums on policies solicited by and delivered through you?

Mr. PARSONS.—If your Honor please, it appears that the agent Stalker was employed by the company

(Deposition of William H. Stalker.)

under a written contract; and the contract is attached to the deposition; and I object to any evidence as to the extent of his power and authority.

The COURT.—Does he say that?

Mr. WARBURTON.—I think the contract clearly shows that he had that authority.

The COURT.—Very well; what is the answer. The question is whether he acted under written authority.

Mr. WARBURTON.—The answer is:

A. While I had no express authority it was my constant practice to take notes for first premiums, and I know that the company was well aware of the fact that I was doing this.

Mr. PARSONS.—I move to strike out the answer.

The COURT.—Let it remain.

Mr. PARSONS.—We reserve an exception.

Interrogatory No. 26: Was it the custom on your part and known to the company and its managers and general agent to deliver policies solicited by and delivered through you on receipt by you of note or notes in payment of the first premium thereon. State fully your practice in this connection as known to the defendant company?

Mr. PARSONS.—Objected to as incompetent, irrelevant and immaterial, and an attempt to vary the terms of a written contract by parol.

(Deposition of William H. Stalker.)

A. I have answered this question in the previous interrogatory and repeat the answer as given above.

Mr. PARSONS.—Move to strike out the answer on the same grounds.

The COURT.—Let it remain and I will take the matter up when we come to discuss it.

Mr. PARSONS.—We reserve our exception.

Interrogatory No. 27: Did you ever inform the defendant or its general agent that said Frederick C. Dobler was carrying $5,000 accident insurance in the Travelers' Insurance Company, of Hartford Connecticut, at the date he made the application for the policy of insurance in question?

A. I did not, because it was not necessary.

Interrogatory No. 28: (Not read.)

Interrogatory No. 29: Please attach to this deposition all letters and statements made by you to defendant company between the 1st day of March and the 1st day of May, 1903, relative to the payments of the first premium on the policy of insurance in question by Frederick C. Dobler, and also the letters with reference to what other insurance Mr. Dobler was carrying at the time he made the application for the insurance in question. If you have not the originals, please attach copies of the same if you have them; and if you have neither originals or copies, state the substance of them?

A. I have nothing but the receipt which I have already attached to this deposition.

(Deposition of William H. Stalker.)

Interrogatory No. 30: Please attach to this deposition all letters and telegrams received by you from defendant company or its agents between the 1st day of January, 1903, and the 1st day of May, 1903, relative to payments of the first premiums on the policy of insurance in question. Also, in reference to what, if any, other insurance he was carrying, whether accident or life, and attach the same to your deposition with proper marks of identification?

A. I have already attached everything that I have with reference to this.

Cross-interrogatories and Answers.

(Read by Mr. PARSONS.)

Cross-interrogatory No. 1: If you have testified that you were formerly an agent of the Mutual Reserve Life Insurance Company, state whether you had a written contract with said company specifying the powers and authority that were conferred upon you as such agent; and if you had such a contract, will you attach the original thereof, if now in your possession as an exhibit to your deposition?

A. I have the original which I refuse to deliver, but I attach to this deposition a copy of the same, marked Exhibit "B."

Cross-interrogatory No. 2: If you have testified that you delivered to said Frederick C. Dobler said policy of insurance No. 1,004,047, state whether, at or prior to the delivery to him of said policy, he paid you any money

(Deposition of William H. Stalker.)

on account of the first premium thereof, and if he did, when and how much?

A. I have already answered this interrogatory in response to direct interrogatories 6 and 7. I do not recall whether any money was paid on the notes given by Mr. Dobler before the delivery of the policy.

Cross-Interrogatory No. 3: Did Frederick C. Dobler at any time pay to you any money on account of the first premium on said policy No. 1,004,047; if so, when and how much?

A. He paid to my credit on behalf of the defendant insurance company, at the First National Bank of Baker City, Oregon, the full amount of the note, to wit, $254.54. This payment was made in installments.

Cross-interrogatory No. 4: Did you ever have in your possession the official receipt of the Mutual Reserve Life Insurance Company on said company's authorized form, signed by its treasurer for the first premium on policy No. 1,004,047; if so, did you ever deliver such receipt to said Frederick C. Dobler?

A. I have never used an official receipt issued by any company in my experience more than two or three times (I understand from this that the answer called for is whether I delivered an official binding receipt).

Cross-interrogatory No. 5: If you have testified in your examination in chief that you collected the first premium on said policy of insurance, 1,004,047 and remitted the amount so collected to the Mutual Reserve

(Deposition of William H. Stalker.)

Life Insurance Company, now state to whom and where such remittance was made, and whether the same was accompanied by any letter or writing from you, and if it was, to whom such writing was addressed and the date thereof?

A. I delivered to Mark T. Cady, the company's supervisor of agents for Oregon, a draft for $200.00, and notes to the amount of $800.00 on March 4th, 1903, and took his receipt for same, which has already been delivered to the commissioner, and marked Exhibit "A."

Cross-interrogatory No. 6: If you have testified in your examination in chief that said Frederick C. Dobler gave his promissory note for the first premium on said policy of insurance No. 1,004,047, state to whom such note was payable and what you did with it?

A. The note given to me by Frederick C. Dobler was made payable to himself, and endorsed in blank by him and delivered by me to the First National Bank of Baker City for collection, and as collateral to secure a note of mine.

Cross-interrogatory No. 7: If in answer to interrogatories 16 and 17, of your direct examination, you have testified that you are familiar with the custom and practice of the Mutual Reserve Life Insurance Company with regard to the character of assurance, a disclosure of which is called for in the questions contained in the applications of said company, now state fully upon what you base your knowledge and particularly wheth-

(Deposition of William H. Stalker.)

er you have ever had any advice or instructions from said Mutual Reserve Life Insurance Company in that regard?

The COURT.—The question referred to was ruled out. Pass to your next question.

Mr. PARSONS.—The next interrogatory is on the subject. I will read No. 9:

Cross-interrogatory No. 9: If in answer to Interrogatory No. 25 of your direct examination, you have testified that you were authorized by the Mutual Reserve Life Insurance Company to accept notes in payment of first premium on policies of assurance solicited by you, state when, where, and by whom such instructions were given to you and whether the same were oral or in writing, and if in writing, will you attach such writting as an exhibit to your deposition?

Mr. WARBURTON.—We are entitled to that answer.

The COURT.—Read the answer.

A. They gave me no instructions on this point. They were familiar with the fact that I was taking notes and they received from me several notes on that character in payment of first premiums.

Cross-interrogatory No. 10: If in answer to Interrogatory No. 26 of your direct examination you have testified that it was your custom to deliver policies of insurance of defendant company upon receipt of notes in payment of the first premiums thereon and that such custom was

(Deposition of William H. Stalker.)

known to defendant company, state how you know it was so known to said company, whether you ever so advised it and if so, when, where and how, whether orally or in writing, and if in writing, to whom such writing was given?

A. I know it was known to the company from the fact that I delivered to Mark T. Cady, of Portland, Oregon, their supervisor of agents, some notes taken by me as payment of first premium on policy, and also by the fact that I had some correspondence with the officers of the company (or purporting to be such) relative to notes that I had so taken.

Mr. PARSONS.—Now, if your Honor please, we offer in evidence the contract referred to in the deposition and marked Exhibit "B" in this deposition.

(Contract referred to read in evidence.) (Signature and certificate of commissioner attached to original deposition.)

Mr. WARBURTON.—I now offer and read in evidence the deposition of J. T. DONNELLY, a witness on behalf of plaintiff, the deposition being taken on stipulation between counsel for the parties. Without reading the stipulation, I will read the questions and answers:

(Said stipulation being in words and figures following, to wit:)

It is hereby stipulated and agreed between the above-named plaintiff and the above-named defendant by their

(Deposition of J. T. Donnelly.)

respective attorneys that the depositions of J. T. Donnelly of Baker City, Oregon, and W. T. Phy of Hot Lake, Oregon, may be taken at Baker City, Oregon, or any convenient place in that vicinity on the 27th day of June, 1904, before W. S. Levens, a notary public, or on such day or days subsequent as the said Levens may adjourn such hearing, the said parties hereby waiving all preliminary notice, commission and other forms, said depositions to be read in evidence by the plaintiff or defendant on the trial of the above cause; said deposition to be taken by written interrogatories hereto annexed.

It is further agreed that said depositions may be read at the trial, subject only to the objection of the competency, relevancy and materiality of the testimony of said witness, said depositions to be executed and returned to the above-named Court as prescribed by the practice and procedure under the laws regulating the practice in this court, and said Commissioner shall have all the power and authority that he would have in the premises were he duly commissioned to take the depositions in said cause under the order of this Court. (Signed by attorneys.)

Q. Interrogatory 1: Give your name, residence and occupation?

A. J. T. Donnelly, Cashier First National Bank, Baker City, Oregon.

Interrogatory 2: What was your occupation on or about the 16th day of March, 1903?

(Deposition of J. T. Donnelly.)

A. The same as at present.

Interrogatory 3: If in answer to the preceding interrogatory, you state you were cashier of the First National Bank of Baker City, Oregon, state whether your bank on or about the 16th day of March, 1903, received a letter from the Mutual Reserve Life Insurance Company of New York signed by one William Porter, Comptroller, and addressed to Mr. Levi Ankeny, as President of your Bank?

A. Such letter was received.

Interrogatory 4: If you answer the preceding question in the affirmative, please attach the original letter to this deposition with proper mark of identification? If you have not the original, please attach a copy?

A. Original hereto attached, and marked Exhibit "A," J. T. D.

Mr. WARBURTON.—I would like to have that letter read now.

The COURT.—Proceed.

(Letter read.)

Interrogatory 5: State whether or not, you as cashier of said bank, answered said letter?

A. I did.

Interrogatory 6: If you did, please attach to this interrogatory your letter answering the same. If you have not the original, please attach a copy of the same to your answer to this interrogatory with proper marks of identification.

(Deposition of J. T. Donnelly.)

A. Press copy of answer hereto attached, marked Exhibit "B," J. T. D.

(Letter read.)

Interrogatory 7: Please state whether or not at any time in the months of October, November or December, 1903, you held or took as collateral a note signed and executed by one Frederick C. Dobler in the sum of $254.54? A. Yes.

Interrogatory 8: State whether or not if you know whether said note was given by Mr. Dobler to Mr. Stalker in payment or part payment of a premium on life insurance Policy No. 1,004,047, of the Mutual Reserve Life Insurance Company of New York?

A. The note was given for premium on life insurance policy, but I don't know the number of the policy.

Interrogatory 9: State whether or not said note was paid by said Frederick C. Dobler?

A. Yes, it was.

Interrogatory 10: If you had possession of said note as collateral or more than one occasion, state whether or not the note was finally paid by Frederick C. Dobler?

A. It was paid by Frederick C. Dobler.

Interrogatory 11: If you have answered that said note was finally paid by said Frederick C. Dobler, state whether or not you accounted for the same, and the date you accounted for the same to William Hyde Stalker?

(Deposition of J. T. Donnelly.)

A. The note was paid by Dobler on or about February 16, 1903, and on the same date we accounted to Mr. Stalker for the proceeds.

Interrogatory 12: If you have produced in answer to question 6 a letter addressed to the Mutual Reserve Life Insurance Company of New York in response to one sent by them to you please state whether or not the facts recited in that letter are true and correct?

A. The facts recited in a letter to the Mutual Reserve Life Insurance Company, a copy of which is hereto annexed, are true and correct to the best of my knowledge and belief.

Interrogatory 13: State whether or not on or about the 4th day of March, A. D. 1903, your bank at the request of and payment to you of $200.00 or about that amount by William Hyde Stalker, issued to him a draft in the sum of $200.00 payable to the Mutual Reserve Life Insurance Company of New York?

A. On March 4th, 1903, William Hyde Stalker purchased of the Bank their Draft No. 39,333 on Laidlaw & Company of New York in favor of Mutual Reserve Life Insurance Company for the sum of $200.00.

Interrogatory 14: If you answer the preceding question in the affirmative, state whether or not said draft was ever cashed by the payee and returned to your bank. If so, please attach the original to this deposition, with proper marks of identification?

(Deposition of J. T. Donnelly.)

A. The draft referred to in the preceding answer was cashed by the payee and returned to the bank and is attached hereto and marked Exhibit "C," J. T. D.

(Draft read in evidence.)

Cross-Interrogatories Read.

(By Mr. PARSONS.)

Cross-Int. 1: If in answer to Interrogatory 7 of your direct examination you have testified that you held as collateral a note executed by one Frederick C. Dobler, state to whom said note was payable and for what purpose, and to secure what obligation it was so held by you?

A. It is my impression at this time that the note was payable to Dobler's own order, and endorsed by him; but am not positive. The note was left with the bank by William Hyde Stalker as collateral to his own note.

Cross-Interrogatory No. 2: If in answer to Interrogatory 8 of your direct examination you have testified that said note was given by Mr. Dobler in payment or part payment of a premium on a certain life insurance policy, state how you acquired this knowledge, and fully how and from whom you acquired any knowledge or information you may have as to the purpose for which the note referred to was given?

A. I talked with Mr. Fred Dobler several times about the note and he told me it was given for insurance.

Cross-Interrogatory 3: Were you present when the note referred to was executed, or were you in any way a party to the transaction in which it was given?

(Deposition of J. T. Donnelly.)

A. I was not present when the note was executed, and was not in any manner a party to the transaction.

Cross-Interrogatory 4: Do you of your own knowledge and apart from what some one may have told you know anything about the purpose for which the said note of said Frederick C. Dobler was given?

A. I have no information concerning the note except such as received from Fred C. Dobler, and W. Hyde Stalker, both of whom told me it was given for insurance.

(Deposition signed by witness and certificate of commissioner thereto annexed.)

Mr. WARBURTON.—I now offer and read in evidence the deposition of W. T. PHY, a witness on behalf of plaintiff, the deposition being taken on stipulation between counsel for the parties. Without reaching the stipulation, we will read the questions and answers:

(Stipulation being the same as stipulation set forth under the testimony of the witness J. T. Donnelly.)

Interrogatory 1: State your residence and occupation or profession?

A. Hot Lake, Union County, Oregon; physician and surgeon.

Interrogatory 2: If you answer the preceding question that you are a physician state how long you have practiced as a physician and from what medical school if any you graduated, together with your degree, if any?

A. Since March, 1897, I graduated from the University Medical College, Kansas City, Missouri, and took

(Deposition of W. T. Phy.)

post graduate work at New York Post Graduate School, and have a degree of M. D.

Interrogatory 3: Were you acquainted with said Frederick C. Dobler who carried a policy of insurance in the sum of $10,000 in the Mutual Reserve Life Insurance Company of New York being No. 1,004,047?

A. I was acquainted with Frederick C. Dobler.

Interrogatory 4: If so, how long, and what was his occupation during that time?

A. Was acquainted with him about six years, he was a mine superintendent at the time of his death and for some time prior thereto, but I do not know how long.

Interrogatory 5: Are you the same W. T. Phy who made answer to questions in proofs of death to defendant company as attending physician?

A. Yes, to the best of my knowledge.

Interrogatory 6: Did you ever consult or attend as a physician Frederick C. Dobler for any disease or ailment during his life time? A. No.

Interrogatory 7: Did you ever consult or attend Frederick C. Dobler within the meaning of the words "consult" and "attend," as used by physicians?

Mr. PARSONS.—We object to that question as incompetent, irrelevant and immaterial; and an attempt to vary the terms of a written contract, the contract sued on is in writing.

The COURT.—I think I will sustain the objection. I don't know what the answer is, but the answer may be a

(Deposition of W. T. Phy.)

proper answer. Read the answer. The question itself is improper. (Answer read.)

A. No; I may add further that I was an intimate friend of Frederick C. Dobler during the last six years of his life, and in conversation with him during our early friendship I had mentioned to him the advisability of persons in general having frequent physical examinations by their physicians as a matter of precaution. Mr. Dobler seemed impressed with this idea, and during the remainder of his life time I made several physical examinations of him including examinations of his urine and at no time did I find any physical ailment. All of these examinations were a matter of precaution with Mr. Dobler, and not with any idea that he had any physical ailment. I never prescribed any medicine for him. I did on several occasions advise him concerning hygienic measures which everyone should follow to preserve their health. I never made any charge for these examinations.

Mr. PARSONS.—I move to strike out the first part of th answer, "no," which assumes a construction by the witness.

The COURT.—Let that go out. That "no" may go out.

Interrogatory 8: Was Frederick C. Dobler within your personal knowledge ever afflicted with any disease or ailment? A. No.

Interrogatory 9: If so, state fully for what you were consulted, or for what you attended him? A. No.

(Deposition of W. T. Phy.)

Cross-interrogatories.

(Read by Mr. PARSONS.)

Cross-interrogatory 1: If, in answer to Interrogatory 4 of your direct examination, you have testified that said Frederick C. Dobler was acting as superintendent of the Cornucopia mines, state how long he had been engaged in that capacity, and whether, prior to the time he had been acting as superintendent of said mines, he had not been employed therein in a subordinate capacity?

A. I understood that he was superintendent at the time of his death and for some time prior thereto, but for how long I don't know.

Cross-interrogatory 2: If, in answer to Interrogatory 5 of your direct examination, you have testified that you are the doctor W. T. Phy who made answer to certain questions in the proofs of death of said Frederick C. Dobler, submitted to said defendant company, state whether the answers so made by you are true?

A. Yes, with the following explanation: I was an intimate friend of Mr. Dobler's, and in conversation with him during our early friendship mentioned to him the advisibility of persons in general having frequent physical examinations by their physicians as a matter of precaution. Mr. Dobler seemed impressed with this idea, and during his lifetime I made several physical examinations of him, including examinations of his urine, and at no time did I find any physical ailment. All of these examinations were a matter of precaution with Mr. Dobler, and not with any idea that he had any physical ailment.

(Deposition of W. T. Phy.)

I never prescribed any medicine for him, but on several occasions advised him concerning hygienic measures which everyone should follow to preserve their health. I never made any charge for these examinations.

Cross-interrogatory 3: Is it not true that said Frederick C. Dobler at intervals during the five years preceding his death called at your office and consulted you?

A. Have answered this in my answer and explanation to question 7 of direct examination.

Cross-interrogatory 4: Did you, as a physician, ever make a physical examination of said Frederick C. Dobler; if so, how many times did you make such an examination, and during what period of time?

A. Yes, at frequent intervals during the last few years of his life, as I have explained.

Cross-interrogatory 5: Did you ever examine his heart; if so, how often and during what period of time?

A. Yes; at frequent intervals during the last few years of his life, as I have explained, it being a part of the physical examination.

Cross-interrogatory 6: Did you ever examine his lungs; if so, how often and during what period of time?

A. Yes; at frequent intervals during the last few years of his life, as I have explained, it being a part of of the physical examination I have already mentioned.

Cross-interrogatory 7: Did you ever examine his urine; if so, how often and during what period of time?

(Deposition of W. T. Phy.)

A. Yes; at frequent intervals during the last few years of his life, as I have explained, it being a part of the physical examination already mentioned.

Cross-interrogatory 8: Were the examinations you made of said Frederick C. Dobler made at his request?

A. Yes; as a matter of precaution.

Cross-interrogatory 9: Where were such examinations made?

A. At my office.

(Signature of witness and certificate of commissioner attached.)

Mr. WARBURTON.—Do you admit that this note was given in payment of the premium?

Mr. PARSONS.—Yes.

Mr. WARBURTON.—We offer in evidence Plaintiff's Exhibit "C."

Mr. PARSONS.—No objection.

The COURT.—It may be admitted in evidence and marked.

(Note marked Plaintiff's Exhibit "C.")

F. I. MEAD, a witness on behalf of plaintiff, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. WARBURTON.)

Q. State your name.

A. F. I. Mead.

Mr. WARBURTON.—I will just shorten it as much as possible. I wish to offer, and I take it for granted that under the former ruling you will exclude it, but I want to make the offer. My purpose is to and I offer to show by Mr. Mead that he has been an assurance agent for thirty odd years, and devoting his whole time to that business; that he has served as agent for several insurance companies, that all old line insurance companies use in their applications language similar to and the same as that contained in this application in question ten. I offer to prove by the witness that it is the practice and custom among insurance companies not to expect or require anyone, in answering such questions, to disclose accident insurance, and that, in his opinion as an insurance expert, the language in question does not call for a disclosure of accident insurance. I offer that evidence.

Mr. PARSONS.—To which offer we object as incompetent, irrelevant and immaterial, and an attempt to vary by parol a written agreement; and on the further ground that no custom or practice is pleaded; and on the further ground that it is not offered to show that any general custom was known to either of the parties at the time

(Testimony of F. I. Mead.)

the application was made; and further that it is not offered to show that any general custom would apply to the particular contract sued upon.

The COURT.—Objection sustained.

Mr. WARBURTON.—We reserve an exception. I will add to that that the custom was known; I don't know whether we can prove it by him or not, but it was known.

(Testimony of witness closed.)

CORA F. DOBLER, a witness on behalf of plaintiff, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. WARBURTON.)

Q. You may state your name and age?

A. Cora F. Dobler. Do I have to give my age?

Q. Are you the daughter of Mrs. Priscilla Dobler?

A. Yes, sir.

Q. Do you remember, Miss Dobler, of the execution on her part of the proofs of death on the life of Frederick C. Dobler, your brother? A. Yes, sir.

Q. In what capacity did you serve her?

A. I just signed her name to all of the blanks.

Q. You signed her name to all of the blanks?

A. Yes, sir.

Q. Do you recollect, Miss Dobler, whether or not, subsequent to the execution of the original proofs of death whether the company requested any other or further proofs?

(Testimony of Cora F. Dobler.)

A. No, sir.

Q. You don't remember, or do you? I say do you remember after the original proofs of death were made and executed whether the company sent on another or further certificates to be filled out?

A. Oh, yes, there was one.

Q. Do you remember what it was?

A. No, sir, I don't remember just exactly.

Q. Do you remember whether your mother executed the subsequent proof? A. Yes.

Q. Did you sign her name to that?

A. Yes, sir.

Q. Was she sworn to it before a notary public?

A. Yes.

Q. Do you know whether they were forwarded to the company after being executed? A. Yes, sir.

Cross-examination.

(By Mr. PARSONS.)

Q. In signing your mother's name to the original proofs of death, you did it by her presence and request?

[No answer.]

Q. I would like to ask you one more question. Do you remember how long it was subsequent to the time of forwarding the original contract?

A. No, sir, I don't remember.

Q. Can you give an estimate of about what time it was? A. No, sir.

Q. Was it longer than two weeks?

(Deposition of John E. Morris.)

A. Yes, sir, I think it was.

(Testimony of witness closed.)

Mr. WARBURTON.—I do not think we have anything further.

Plaintiff rests.

Mr. PARSONS.—The defendant now offers and reads in evidence the deposition of JOHN E. MORRIS, a witness on behalf of the defendant, taken under stipulation: Without reading the stipulation, I will read the questions and answers:

(Said stipulation being the same as hereinbefore set out, excepting as the names of witness, name of commissioner, and place of taking deposition.)

Direct Examination.

Interrogatory 1: State your name, residence and occupation?

A. John E. Morris, Hartford, Connecticut; Secretary of the Travelers' Insurance Company of Hartford, Connecticut.

Interrogatory 2: If in answer to the foregoing interrogatory you have testified that you are an officer of the Travelers' Insurance Company of Hartford, Connecticut, state whether one Frederick C. Dobler, of Cornucopia, Oregon, in the year 1902, was carrying assurance in said Travelers' Insurance Company?

A. In 1902 Frederick C. Dobler, of Cornucopia, Oregon, carried certain insurance in the Travelers' Insurance Company.

(Deposition of John E. Morris.)

Interrogatory 3: If in answer to the foregoing, you have testified that said Frederick C. Dobler was carrying assurance in said Travelers' Insurance Company, in the year 1902, please give the number, date of insurance, and amount of all policies so held by him?

A. He had an accident policy in the Travelers' Insurance Company No. 1,340,413 for the principal sum of $5,000 for the term of twelve months from noon of March 21st, 1902.

Interrogatory 4: Was said assurance in full force and effect in the month of October, 1902, and particularly on the 20th day of October, 1902.

A. This policy of insurance was in full force and effect on the 20th day of October, 1902.

Interrogatory 5: Have you the original of the policy or policies of assurance above referred to now in your possession, if so, will you attach the same with proper marks of identification as exhibits to your deposition?

A. The original policy above mentioned, to wit: Accident Policy No. 1,340,413 is now in the custody of the Travelers' Insurance Company, and if necessary, said original instrument will be produced upon trial. It is hereby marked for identification "J. E. M. 7/8/04 (1)." A certified copy is hereto attached, marked "Exhibit 'A.' J. E. M. 7/8/04 (2)."

Mr. WARBURTON.—We are not disputing that point. We will admit he had a policy in full force and effect, it being the accident policy of which you have

(Deposition of Dr. James W. Bowden.)

a copy there, and you can offer the copy; unless there are others you want. If you will admit that is a copy of the policy, we will admit it was in full force and effect on that date.

The COURT.—Well, read it then; that is all we want.

Mr. PARSONS.—We offer in evidence this copy of the policy.

(Policy marked Exhibit "D-1," and admitted in evidence and read.)

Mr. WARBURTON.—It is admitted that the loss was paid on this policy just read.

The COURT.—That is sufficient, then, you have read enough. Proceed with your next.

Mr. PARSONS.—The defendant now offers and reads in evidence the deposition of Dr. JAMES W. BOWDEN, a witness on behalf of defendant, taken pursuant to stipulation. Without reading the stipulation, I will read the questions and answers:

(Said stipulation being the same as that hereinbefore set forth, except as to names of witnesses, commissioner and place of taking.)

Direct Examination.

Q. Please state your name, age, residence and occupation?

A. James W. Bowden; age, 56 years; Yonkers, New York; Medical Director of the Mutual Reserve Life Insurance Company and physician and surgeon.

(Deposition of Dr. James W. Bowden.)

Q. How long have you been the medical director of the said Company?

A. Since its re-incorporation under that name on April 17th, 1902, and prior to that time I was the Medical Director for many years of the Mutual Reserve Fund Life Association.

Q. What, if anything, have you to do with applications for insurance on lives made to the said Mutual Reserve Life Insurance Company?

A. All applications for insurance are passed upon by me and a policy thereon does not issue until I have approved the application.

Q. Have you in your possession or under your control the original application No. 1,004,047, dated October 20, 1902, signed by Frederick C. Dobler, of Cornucopia, Oregon? A. I have.

The COURT.—That has already been introduced in this case as evidence.

Mr. PARSONS.—Yes, sir.

The COURT.—There is no need then of putting that deposition in.

Mr. PARSONS.—No, I think not.

Mr. PARSONS.—The defendant next offers in the evidence the deposition of ROBERT L. JONES, a witness on behalf of the defendant, taken under the same stipulation. I will read the questions and answers.

Direct Examination.

Q. Please state your name, age, residence and occupation?

A. Robert L. Jones; 36 years of age; Borough of Brooklyn, New York City; assistant secretary of the Mutual Reserve Life Insurance Company of New York.

Q. How long have you held that position in said Company?

A. Since its re-incorporation under that name on April 17th, 1902, and for a number of years prior thereto I held the same position in the Mutual Reserve Life Association.

Q. What particular department of the said company is under your immediate charge and control?

A. The department known as the policy department, from which all policies are issued.

Q. Will you examine the records of said company and tell me whether or not on or about November 7th, 1902, the said company issued a policy to one Frederick C. Dobler, of Cornucopia, Oregon?

A. I have examined the records and I find that under date of November 7th, 1902, the company issued its policy No. 1,004,047, for the amount of $10,000, to the said Frederick C. Dobler, and in that policy his mother, Priscilla Dobler, is named as the beneficiary.

(Deposition of Robert L. Jones.)

Q. Have you prepared a full, true and correct copy of the said policy so issued, and will you now produce it to be marked as an exhibit?

A. I have prepared such a copy and I now produce it, and hand it to the commissioner to be marked as an exhibit in this case.

Mr. PARSONS.—The original policy is also in evidence.

(Policy marked by commissioner taking the deposition as Exhibit No. 2.)

Q. After a policy has been prepared in your department as this one was, is it delivered from your department, or is it by you turned over to some one else for delivery?

A. The policy in this case was not delivered from my department, but was handed to the agency department, and I presume was in some way delivered by them.

Q. Do you know whether or not there was any modification whatever of the terms of this Dobler policy made by the said company prior to the time of its leaving the Home Office in the city of New York?

A. I know that there was no modification made of its said terms.

Q. What was the amount of the first premium required to be actually paid in cash on or before the delivery of this policy?

A. I refer to Exhibit No. 2, and read therefrom that the same is issued "in consideration of the application

(Deposition of Robert L. Jones.)

herefor, hereby made a part of this contract, and of three hundred and eighty-one dollars and eighty cents to be actually paid in cash as a first premium on or before the delivery thereof."

Q. I observe that at the foot of the first page of Exhibit No. 2, there is printed the following: "Premiums may be paid in cash or 33 1/3 per cent by annual premium note and balance in cash." Will you kindly explain the meaning of that endorsement?

A. This means that upon—

Mr. WARBURTON.—I think that is objectionable; it explains itself.

The COURT.—I think so.

Mr. WARBURTON.—We object on that ground.

Mr. PARSONS.—(Continuing.) Q. Was the delivery of this policy Exhibit No. 2 ever reported to the company? A. It was not.

Q. Was any binding receipt such as is mentioned and described in paragraph 1 on the second page of Exhibit No. 2 ever issued by the company, and delivered to Mr. Dobler? A. There was not.

Q. Will you please produce and have marked as an exhibit in this case a blank form of the binding receipt mentioned in the said paragraph of Exhibit No. 2?

A. I now produce a copy of that form of a binding receipt referred to therein, and ask that it be marked as an exhibit.

(Deposition of Robert B. Cannon.)

(Same marked by Commissioner as Exhibit No. 3).

Mr. PARSONS.—The deposition is signed by the witness and executed by the commissioner.

Mr. PARSONS.—The defendant next offers in evidence the deposition of ROBERT B. CANNON a witness on behalf of the defendant, taken under the same stipulation. I will read the questions and answers:

Direct Examination.

Q. Please state your name, age, residence and occupation.

A. Robert B. Cannon; age 34 years; residence New York City; occupation Secretary of the Agency Committee of the Mutual Reserve Life Insurance Company; I have held that position since the company was re-incorporated under that name in 1902, and prior to that time I held the same position under the Mutual Reserve Fund Life Association.

Q. Mr. Cannon, I show you Defendant's Exhibit No. 2, and ask you to state if you know when and to whom this policy was forwarded by you for delivery?

A. It was sent from the Agency Department on November 7th, 1902, to Mark T. Kady, Portland, Oregon, who was at that time an agent for the company in Oregon.

Q. Did the Mutual Reserve Life Insurance Company ever receive any notice or report showing that this policy was ever delivered to the insured?

(Deposition of Robert B. Cannon.)

A. It did not.

Q. Was any binding receipt such as is mentioned in the first paragraph on the second page of Exhibit No. 2 and a form of which is attached as an exhibit to these depositions ever delivered by the company to Mr. Dobler?

A. There was not.

Q. Have you under your care and control the originals of the various contracts made between the company and its several agents?

A. Yes, sir.

Q. Have you the original of the contract in force between the company and William Hyde Stalker, at the time of the issuing of this policy?

A. I have.

Mr. PARSONS.—That contract is also in evidence, if your Honor please.

Q. Will you introduce the original of such contract and have it marked by the commissioner for identification?

A. I produce Mr. Stalker's contract, and ask the commissioner to mark it Exhibit "B" for identification; and I also produce a true and correct copy of said contract, and ask that it be marked by the commissioner as Exhibit No. 4 and attached to these depositions. (Papers so marked.)

Q. Mr. Cannon, were either Mark T. Kady or William Hyde Stalker in any way or under any circum-

(Deposition of William Porter.)

stances authorized by the company to take or accept notes in payment of premiums upon policies?

A. They were not.

Mr. PARSONS.—The defendant next offers in evidence the deposition of WILLIAM PORTER, a witness on behalf of defendant, taken under the same stipulation. I will read the questions and answers:

Direct Examination.

Q. Please state your name, age, residence and occupation.

A. William Porter; age 54 years; residence New York City. Comptroller of the Mutual Reserve Life Insurance Company.

Q. As Comptroller of the company do you have the general supervision and management of its financial affairs and accounts in all the departments of the company? A. I do.

Q. Do you know whether or not the first premium on Policy No. 1,004,047 on the life of Frederick C. Dobler was ever received by the said company?

A. The first premium on that policy was never received by the Mutual Reserve Life Insurance Company. At the time the application was received the company did receive from the applicant Mr. Dobler what is known as a certificate of loan for $127.26, which is one-third of the premium of $381.80 due on said policy. Exhibit No. 2.

(Deposition of William Porter.)

Q. Have you the original of that certificate of loan in your possession, and if so, will you produce it and have it marked by the Commissioner for identification?

A. I now produce the original of said certificate of loan and hand it to the commissioner to be marked.

Mr. PARSONS.—I think that is already in evidence. I also produce a true and correct copy of Exhibit "C" for identification and offer it as an exhibit in the case. That is attached to the deposition.

Q. Was the difference between the amount of this certificate of loan, Exhibit No. 5, and the first premium of $381.80 due on Exhibit No. 2, namely, the sum of $254.52, ever received by the company in cash or otherwise?

A. No, it was never received.

Q. State if you know whether or not the official receipt referred to in paragraph 2 on the second page of the policy of which Exhibit No. 2 is a copy was ever issued for the first annual premium due on said policy?

A. It was not.

Q. Are you the William Porter whose deposition was heretofore and on or about the 17th day of February, 1904, taken on behalf of the plaintiff?

A. I am.

Q. Referring to your testimony given at that time, I call your attention to your statement that there was received from Mr. Mark T. Kady a letter which was marked on the taking of your said deposition Plain-

(Deposition of William Porter.)

tiff's Exhibit "G" for identification and in which was enclosed a draft for $200.00, and to your statement that when that draft was received, Mr. Stalker was largely indebted to the company and the amount of the draft was insufficient to wipe out his indebtedness, and to your further statement that there was a statement made up as to how that $200 was applied on account of Mr. Stalker's indebtedness, and I will ask you to produce if you can the original statement so made as testified by you and have the same marked for identification, and also produce a true and correct copy of and have the same attached to and made a part of your deposition marked an exhibit thereto?

Mr. WARBURTON.—I object to that answer, as any statement they make contradictory, after they received the money would estop them.

The COURT.—It may be that the answer will show they got the money, and if they did I should think you would want it in. If they got the money and applied it on Stalker's account, of course, I should think you would want that proof in.

Mr. WARBURTON.—All right.

Mr. PARSONS.—(Reading:) A. I produce the statement in question which is marked Exhibit "D" for identification and also a true and correct copy, which is marked Exhibit No. 6, and attached to and made a part of my deposition.

(Deposition of William Porter.)

Q. At the time of the receipt of this draft for $200, had the defendant received any notice or request from any person to apply such $200, or any part of it, on account of the first premium on the policy sued on in this case? A. It had not.

Q. State if you know what authority if any William Hyde Stalker had to accept notes in payment of premiums due on policies of insurance issued by the defendant on applications solicited by him.

A. He had no authority whatever to accept any notes for such a premium so far as the company was concerned, and, according to the terms of its policies, no policy took effect until the actual cash for the first premium was received by the company itself during the lifetime and good health of the insured and its official receipt issued therefor, and no agent of the company had authority to waive or modify this condition.

Q. What knowledge, if any, had the defendant company as to any custom on the part of William Hyde Stalker to accept notes in payment of premiums on policies issued by the defendant?

A. The defendant had no knowledge of any custom on the part of Mr. Stalker to accept notes for premiums or for any part of premiums until about the middle of February, 1903, when it was trying to get Mr. Stalker to report as to what policies he had delivered and what collections on account of the same he had made.

Q. Did the defendant company at any time ratify the action of Mr. Stalker in accepting such notes?

(Deposition of George W. Harper.)

A. It did not. Defendant had at no time ratified or authorized the acceptance of such notes, and has at all times insisted upon its position that no policy was in force until the first premium was actually paid to the defendant in cash during the lifetime and good health of the insured and its official receipt issued therefor.

(Signature and certificate.)

Mr. PARSONS.—The defendant next offers in evidence the deposition of GEORGE W. HARPER, a witness on behalf of defendant, taken under the same stipulation. Omitting the stipulation I will read the questions and answers:

Direct Examination.

Q. Please state your name, age, residence and occupation.

A. George W. Harper; age 54 years; residence Borough of Brooklyn, New York City; occupation, Treasurer of the Mutual Reserve Life Insurance Company.

Q. Please state what, if any, connection you have with the Claims Department of the Mutual Reserve Life Insurance Company?

A. I am the head of that department.

Q. What, if any, are your duties as head of the Claims Department, with relation to the receipt of examinations of proofs of loss and claim under the defendant company's policies?

A. As head of the Claims Department, I conduct the correspondence with relation to death claims, receive

(Deposition of George W. Harper.)

the proofs submitted, and examine and pass upon the same.

Q. Please state how long you have occupied that position with the Claims Department with the defendant and performed the duties you have referred to?

A. Since April 17th, 1902, as regards the Mutual Reserve Life Insurance Company, and for several years prior thereto, as regards the Mutual Reserve Fund Life Association.

Q. State if you know whether the defendant company ever received a request for blank proofs upon which to make proof of death and of claim under the policy sued upon in this case, and if so, when and under what circumstances?

A. It received such request on the 17th of April, 1903, in a letter from Mr. W. H. Stalker, stated to be written on behalf of Priscilla Dobler, of Sumner, Washington.

Q. State what action, if any, the defendant company took in relation to complying with such request?

A. It forwarded blank proofs to Mrs. Priscilla Dobler, of Sumner, Washington, by mail, enclosed in a letter on the 17th day of April, 1903.

Q. Have you the original letter referred to in your possession, and if not, state, if you know, what became of it?

A. I have not the original letter which was mailed to Mrs. Priscilla Dobler, addressed to her at Sumner, Washington, enclosed in a securely sealed, postpaid

(Deposition of George W. Harper.)

envelope, also enclosing the blank proofs of loss, and deposited in the United States mail in the general post-office in the city of New York on April 17th, 1903.

Q. Have you a true and correct copy of the letter in your possession, and if so, will you please produce the same, and attach it to and make it a part of your deposition marked as an exhibit thereto.

A. I have a copy of the letter, and I have produced it, and it is attached to and made a part of my deposition, marked Exhibit No. 7.

Q. As the date of writing the letter in question, had the defendant company, or any of its officers, any knowledge or information that Frederick C. Dobler, the holder of the policy sued upon in this case, ever held a policy of any kind in the Travelers Insurance Company of Hartford Connecticut? A. No.

Q. Did the defendant company at any time receive back the blank proofs of loss and claim forwarded to Mrs. Dobler in your letter of April 17th, 1903, and if so when?

A. The defendant received such proofs filled out approximately about the first week in May, 1903, the exact date I am unable to give.

Q. Have you the original proofs so filled out in your possession, and if so, will you produce the same and have them marked for identification and also produce a true and correct copy thereof, and have the same attached to and made a part of your deposition marked as an exhibit thereto.

(Deposition of George W. Harper.)

A. I have the original proofs, which I produce, and which are marked Exhibit "E" for identification; and I have a true and correct copy of the same which is attached to and made a part of my deposition marked Exhibit No. 8.

Q. After the receipt of these proofs Exhibit "E" for identification and of which Exhibit No. 8 is a copy, did the defendant at any time, make a request for any further proofs of loss or claim under the policy sued upon herein? A. It did not.

(Signature and certificate.)

Mr. PARSONS.—Defendant now offers in evidence Exhibit 3 attached to this deposition, being a blank form of the official binding receipt referred to in the policy.

(Admitted in evidence without objection, and read to the jury.)

Mr. PARSONS.—The defendant offers in evidence Exhibit No. 6 referred to in the deposition, being a statement of the application made by the company of the $200 received by it.

Mr. WARBURTON.—We object to the admission of that statement; it is a statement made by the home office.

The COURT.—I don't think it is material. I don't see how it is material. There was one of the answers read here wherein one of the witnesses said the company never received any part of the money. Now, if they say they did receive the money, and applied to the credit of

the company's agent, I would think that would be competent.

Mr. WARBURTON.—Objection withdrawn. It may go in.

The COURT.—As a matter of course, the company has no right to take this money to pay the debt of an agent owing to them.

Mr. WARBURTON.—Objection withdrawn.

Mr. PARSONS.—Without reading the statement, I will say—

The COURT.—Oh, well, read it. Is it a long statement?

Mr. PARSONS.—No, it is printed. The only purpose of it is to show that the money was applied on other policies.

The COURT.—Well, it is to go at that, then, with the statement by counsel that the money was applied on other policies.

(Statement admitted in evidence and marked.)

Mr. PARSONS.—Defendant offers in evidence Exhibit No. 7 referred to in the depositions, being copy of letter written by the company to Mrs. Dobler enclosing blank form of proof of death.

Mr. WARBURTON.—I think the original was offered in evidence.

The COURT.—I think that is the same as the original letter.

(Copy of letter read.)

Mr. WARBURTON.—We will admit that that is a correct copy of the letter.

Mr. PARSONS.—Defendant offers in evidence the proofs of death, the original proofs.

Mr. WARBURTON.—No objection.

The COURT.—Very well, it is to be admitted. What is the particular point? Unless there is no particular thing, it may as well be stated.

Mr. PARSONS.—There is one or two particular points, if your Honor please, which I will read. "Q. 24 a. In what other companies or societies, and to what amount in each was life of deceased insured? a. Washington Life, $5,000; Travelers', $500; Travelers' (Accident), $1,000." "b. Had deceased any insurance on his life not above mentioned?" There are two parts to the question. That part of the proofs of death executed by the physician, W. T. Phy: "Q. 9. a. When did you first attend or practice for deceased, and for what. b. date of last visit. a. Prescribed at intervals for five years. b. never made any."

Mr. WARBURTON.—There are a few questions following that that I would like to read. Q. 8. When did the health of deceased first begin to be affected? Please give date. a. Good until time of death. When did you first attend or practice for deceased, and for what? Date of last visit. a. Prescribed at intervals for five years. b. Never made any visits. Had deceased at any time traveled, been away from home or changed occupation, resi-

dence or climate on account of health, etc. a. No. Q. 12. Had the deceased ever had any other disease, acute or chronic, or had he ever had any injury or infirmity of which you have any knowledge or information. If so, what and when. a. Not to my knowledge. Q. 13. Did deceased use liquors; and the answer is "No." Have you ever prescribed or attended deceased for any sickness, disease, ailment or injury, other than as stated above? No. He don't state in the above that he had any disease or ailment.

Mr. PARSONS.—That is all that I care to introduce at this time; I think that is all that we have before recess.

And thereupon, recess of court was taken to the hour of 2 o'clock P. M. of said day.

July 25th, A. D. 1904, 2 o'clock P. M.

Court convened, pursuant to recess. Jurors and all parties present in court. Trial resumed.

Mr. PARSONS.—Now, if your Honor please, the defendant moves to strike out from the testimony of the witness William Dobler and the testimony of the witness Miss Cora F. Dobler, the testimony in relation to additional proofs of loss required by the defendant company, upon the ground that it appears that whatever is done in that regard was in writing and that the writing is the only and proper evidence.

The COURT.—The motion will be denied. I understand that they have the original in their possession.

Mr. PARSONS.—No; there is no request or demand been made upon the defendant for the writing.

The COURT.—I will deny the motion to strike.

Mr. PARSONS.—To which we reserve our exception.

The COURT.—And I may as well now state to the counsel that during the recess of court I have considered the questions involved here, and I am inclined to think that the question and answer ruled out by the Court ought to have been admitted . I think that the plaintiff is entitled to introduce in evidence the conversation between the assured and the defendant's agent at the time this application was made. You may reserve an exception to that ruling if you wish, and let that question and answer stand.

Mr. PARSONS.—If your Honor please, that question is one which has occupied the attention of the courts of this country for many years, and has been decided in many ways; but I think the Supreme Court of the United States, in a very recent decision, has gone over all the previous decisions and has definitely determined the rule to be that parol evidence under such conditions is not admissible.

The COURT.—There is one other question left open, and that is as to the custom of these agents, which is a matter which is still left open for discussion, and you may consider that open for discussion now. I will hear what you have to say on that, but my impression is that that evidence should be admitted. However, if you have a decision of the Supreme Court of the United States to the contrary, of course, that would rule.

Mr. PARSONS.—Do you care to hear that at this time?

(Testimony of William Dobler.)

The COURT.—Well, I suppose you are through with your evidence.

Mr. PARSONS.—Practically; I only want to recall Mr. Dobler for a few questions.

The COURT.—Well, put in your evidence.

WILLIAM DOBLER, heretofore sworn on behalf of plaintiff, being recalled, testified as follows, to wit:

Direct Examination.

(By Mr. PARSONS.)

Q. Mr. Dobler, what was your son's, Frederick C. Dobler, occupation at the time he made the application for this policy?

A. At the time he made the application? Why, he was mining superintendent.

Q. Do you know how long he had been engaged as mining superintendent?

A. Well, he has been in the mining business for some seven years altogether before his death.

Q. How long had he been acting as superintendent of the Cornucopia mine?

A. Well, now, that I couldn't distinctly say, but I have another son here—

Mr. WARBURTON.—Ask him if he knows.

A. I don't know how long he has been acting in that capacity.

Q. Was it more than two years?

(Testimony of William Dobler.)

A. I have got another son here who can state more fully how long he has been there, as he was there at the time that Fred was to work there.

Q. Well, I just want to get your own personal knowledge of the matter. Do you know whether he has been acting as that for more than two years? A. Yes, sir.

Q. For more than three years?

A. That I don't know. I know that he has acted as mine superintendent for another concern, besides this Cornucopia mining company.

Q. You don't know whether it is more than three years or not?

A. No, sir, I don't know whether it is more than six years or not.

Q. Did your son, Frederick C. Dobler, at the time of his death, have a policy in the Traveler's Insurance Company for $1,000? A. Yes, sir.

Q. Do you know when the policy was issued or taken out?

Mr. WARBURTON.—We have the original policy here, and you can look at it (handing paper to counsel).

(Counsel examines policy.)

Mr. PARSONS.—The defendant offers this policy in evidence.

Mr. WARBURTON.—We object to it; the policy shows on its face it was taken out long after the other insurance was taken out.

The COURT.—Then it is not relevant at all.

(Testimony of William Dobler.)

Mr. PARSONS.—No, if that is a fact then it would not be relevant, but the policy recites on its face January 6th, 1902, for the term of one year, and the application for the insurance in controversy here was made in October, 1902.

Mr. WARBURTON.—It should be January, 1903; that is the date of the issuance of it.

Mr. PARSONS.—Do you admit it was in force?

Mr. WARBURTON.—No, no, it was not in force.

Mr. PARSONS.—The policy upon the face of it shows it to have been dated January 6, 1902.

Mr. WARBURTON.—There is the letter accompanying it; it is simply a misstatement in the date there.

The COURT.—Well, it is not set up in your answer.

Mr. PARSONS.—Yes, it is set up.

Mr. WARBURTON.—It appears, according to this letter that it was made after 1902, and that it was issued January 3, 1903, but it was not in force at the time.

Mr. PARSONS.—On the bottom of the face of the policy it is the same—January, 1902. I don't know anything about the facts, but on the face of the policy—I think we will still offer the policy in evidence.

The COURT.—It may be admitted in evidence.

Mr. WARBURTON.—We object, as irrelevant, incompetent and immaterial, and we will make a point on the instructions.

(Testimony of William Dobler.)

The COURT.—It really makes no difference in the case whether it is in or out. I understand that is the same kind of a policy as the other. The letter goes in with it.

(Policy admitted in evidence and marked.)

Cross-examination.

(By Mr. WARBURTON.)

Q. Did you make any inquiry to ascertain, Mr. Dobler, whether it was issued in 1902 or 1903?

A. Nothing more than I saw by the letter.

(Testimony of witness closed.)

Mr. PARSONS.—That is the defendant's case.

Defendant rests.

The COURT.—Well, now I will hear you upon these questions. Have you any more testimony, Mr. Warburton?

Mr. WARBURTON.—Not unless the Court allows us to introduce Mr. Mead.

The COURT.—I first want to dispose of the question of the admissibility of that testimony. You may proceed.

(Argument of counsel.)

The COURT.—(After argument of counsel.) There is undoubtedly grave apparent conflict in the decided cases as to the true rule covering this question; but, after considerable thought on the matter, I have reached the conclusion that in this particular case what took place between the agent and the assured at the time this application was made may be properly received in evidence.

It is part of the res gestae. It shows the circumstances under which the application was made and the particular interpretation which was placed by the parties at the time upon this provision found in the application in regard to other insurance. Now, if it were perfectly plain and clear that the answer to that question required the applicant to disclose the fact that he had the accident policy mentioned, then this testimony would not be relevant; but it is not clear. The phrase itself is an ambiguous one. It may call for the disclosure or it may not. It is broad enough; it might be understood by the parties as calling for such disclosure, and, on the other hand, it may be understood by the parties as not calling for such disclosure. Now, the Supreme Court of the United States, in the case of the Continental Insurance Company vs. Chamberlain, 132 U. S., say that the purport of the word insurance, in the question, has the same party any other insurance on his life, is not so absolutely certain as in an action upon that policy to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was asked. Now, if that is the rule, a presumably reasonable one, to apply to this case, it is broad enough to permit the answer to the question as to what was said by the insurance agent in relation to the answers to be made to that question. Then let us go further, and consider that when the application was made, when it was completed, the matter of receiving it was the act of the agent of the company, and when it was transmitted to the defendant, going as it did with the construction which he and the assured placed upon it, and when he accepted

the money of the assured, the assured supposed he was making a full and complete answer to this question; I think that the company ought to be estopped from insisting upon a literal interpretation of the answer to that question. In other words, that it should be held to give it the same interpretation given it by its own agent at the time. Now, the court in this case (Cont. I. Co. vs. Chamberlain, 132 U. S.) say: The purport of the word in the question has the said party any other insurance on his life, is not so absolutely certain as in an action upon that policy as to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was asked. Such proof does not necessarily contradict the written proof. It simply explains it. It brings to the attention of the Court and the jury what the parties meant in the use of the particular language which is under consideration. Of course, I may be in error as to this, but that is the conclusion that I have reached, and the ruling will be in accordance with that conclusion, and the defendant may have an exception to the ruling, so that it may be reviewed by a higher court.

Mr. WARBURTON.—I think that will necessitate the reading of some more testimony.

The COURT.—It will necessitate the reading of that one question and answer of the testimony of the agent.

Mr. WARBURTON.—I think I had better read the preceding three or four questions, which your Honor may exclude if I have not the right one.

The COURT.—If you will pass that up to me, I will indicate the ones. (Examines the paper.) It is No. 22 and No. 23. You may read those.

Mr. WARBURTON.—Interrogatory 22: Referring to question ten, in said application, part 1, were you aware and informed by Frederick C. Dobler, at the time of preparing the application mentioned, that he, the said Frederick C. Dobler, was carrying $5,000 accident policy in the Travelers' Insurance Company of Hartford, Connecticut. State fully? The answer is—

Mr. PARSONS.—Let the record show our objection as incompetent, irrelevant and immaterial, and an attempt to vary the terms of a written contract by parol.

The COURT.—Yes, let the record show that, and that the objection was overruled, and exception allowed.

Mr. WARBURTON.—The answer is: I was. He told me that he was carrying $5,000 accident insurance in the Travelers' Insurance Company of Hartford, Connecticut, and he also called my attention to a policy for $1,000 accident insurance that he carried in another company (the name of which I don't remember). I was also aware of the fact that he carried a $5,000 policy in the Washington Life of New York. He took particular pains to explain to me all his business affairs in connection with insurance. I told him that the $5,000 accident insurance, likewise the $1,000 accident policy was not called for in answer to question 10 in application of Mutual Reserve Life Insurance Company.

Interrogatory 23: If your answer to the preceding interrogatories discloses that you wrote in the answer in the application, part 1, state whether or not it was understood between you and the said Frederick C. Dobler that the answers so written in by you were full, true and complete answers to the respective questions according to the information given you by said Frederick Dobler?

Mr. PARSONS.—We make to that the same objection as before.

The COURT.—Objection overruled, and exception allowed.

Mr. WARBURTON.—I will read the answer: A. It was so understood between Mr. Dobler and myself. There was no disposition on the part of Mr. Dobler to conceal anything, neither was there on my part, because I could not see and cannot see now, why the accident insurance carried by Mr. Dobler would affect the issuing of the policy in question.

The COURT.—Are you ready to go to the jury?

Mr. WARBURTON.—The plaintff is unless it is to move for a peremptory instruction. I am prepared to discuss the instructions if you wish.

Mr. PARSONS.—Now, if your Honor please, the defendant moves the Court to direct a verdict for the defendant on that ground that it appears by the undisputed evidence that in the application for the policy in question there were two distinct breaches of warranty: First, as to other insurance held by the applicant at the

time the application was made; and second, as to the applicant having consulted a physician. Now, it seems to me if your Honor please, that under this contract and under the decisions, the facts being undisputed—I think entirely so—on those two points, that it is purely a question of law for the Court as to the construction of this contract.

The COURT.—(After argument.) I think under the ruling I have already made that the case ought to go to the jury, under proper instructions.

Mr. PARSONS.—We reserve our exception to the denial of the motion.

Mr. McDANIELS.—Before commencing the argument, I will ask the Court if either of the peremptory instructions will be given.

The COURT.—I am not prepared to say what the ruling will be.

And thereupon, upon the close of the introduction of evidence herein, for and on behalf of the parties hereto respectively, and prior to the argument by counsel of said cause to the jury, the respective parties hereto by their counsel, in writing requested the Court to instruct said jury and to give to said jury the following instructions, to wit:

(Page 70.)

(All of page 70 stricken out.—DE HAVEN, Judge.)

And thereupon, the plaintiff requested the Court to instruct the jury as follows, and to give to said jury the following instructions, to wit:

1.

Gentlemen of the Jury: You are instructed to return a verdict for the plaintiff in the sum of $10,127.26, together with interest at the rate of 6% per annum from the 17th day of July, A. D. 1903.

2.

If Instruction No. 1 is not granted plaintiff asks the following instruction:

This is an action brought by plaintiff, Priscilla Dobler, on a policy of insurance issued by defendant, the Mutual Reserve Life Insurance Company of New York City, in the sum of $10,000. It is also provided in the policy that if it should mature by death within twenty years from its date, while in due force under its original premium paying conditions, there should be payable to the beneficiary thereunder as a mortuary dividend an amount equal to one-third of the premium paid thereon. There was but one premium paid on this policy. If plaintiff is entitled to recover under the instructions I shall give you, she is entitled to a verdict at your hands in the sum of $10,127.26 with interest thereon from the 17th day of July, 1903, at the rate of 6% per annum.

3.

I charge you that the plaintiff is entitled to recover in this action unless defendant has established one of its defenses, to which I will hereafter call your attention.

4.

One of the defenses interposed by defendant to the recovery on this policy is that neither Frederick C. Dobler nor plaintiff paid the first premium of $361.80 on the policy in question, in cash, according to the terms of the

(Page 71.)

(All of page 71 stricken out.—JOHN J. DE HAVEN, Judge.)

application and the policy, and that the defendant never delivered to Frederick C. Dobler, or any person for him, the policy of insurance. I charge you that defendant has not made out this defense, and that you will therefore wholly disregard the same.

5.

Defendant further defends on the ground that Frederick C. Dobler committed a breach of warranty in that he did not make full, complete and true answers to questions 10 in part I of the application, which question is in these words:

10. Have you now any assurance on your life? If so, where, when taken, for what amounts and what kind of policy? Have you any other insurance?

To which Mr. Dobler made this answer: $5,000.00, Washington Life, May, 1900; amount, $5,000.00; combination bond. None.

Defendant claims that this answer was not full, complete and true in that Mr. Dobler was carrying at the time a $5,000.00 accident policy in the Travelers' Insurance Company of Hartford, Connecticut. It is admitted by plaintiff that Frederick C. Dobler was carrying a $5,000.00 accident policy in the said Travelers' Insurance Company of Hartford, Connecticut.

I instruct you that the failure of Frederick C. Dobler to mention this $5,000.00 accident policy was not a breach of warranty and you will wholly disregard the refense.

6

If the foregoing instruction is not given, the plaintiff asks the following instruction:

Defendant further defends on the ground that Frederick C. Dobler committed a breach of warranty in that he did not make full, complete and true answers to question 10 in part I of the application, which question is in these words:

(Page 72.)

(All of page 72 stricken out.—JOHN J. DE HAVEN, Judge.)

"10. Have you now any assurance on your life? If so, where, when taken, for what amounts and what kind of policy? Have you any other assurance?" To which Mr. Dobler made this answer: "$5,000.00; Washington

Life; May, 1900; amount, $5,000.00; combination bond. None."

Defendant claims that this answer was not full and complete and true in that Mr. Dobler was carrying at the time a $5,000.00 accident policy in the Travelers' Insurance Company of Hartford, Connecticut. It is admitted by plaintiff that Frederick C. Dobler was carrying a $5,000.00 accident policy in the said Travelers' Insurance Company.

If you find that a doubt might reasonably and fairly be entertained as to whether this question called for a disclosure of any purely accident insurance that Mr. Dobler then carried, and that Mr. Dobler understood that it did call for the disclosure of purely accident insurance but that it called only for a disclosure of life insurance, then you must conclude that his answer to this question was full, true and complete, and you will consider this defense no further.

7.

Defendant further defends on the ground that Mr. Dobler committed a breach of warranty in that he did not make full, complete and true answers to question No. 13 in part I of the application, and question No. 14 in Part II of the application. Question No. 13 in Part I is as follows:

A. When did you last consult a physician and for what reason?

To which Mr. Dobler answered: "Do not remember, years ago."

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(All of page 73 stricken out.—JOHN J. DE HAVEN, Judge.)

Question No. 14 in Part II is as follows:

A. How long since you last consulted, or were attended by a physician. Give date.

To which Mr. Dobler answered: "Do not remember, long time ago."

You are instructed that these questions called for a disclosure of only those instances, if any, in which Mr. Dobler had been consulted, or been attended by, a physician for some disease or ailment that he had or supposed he had. And inasmuch as the testimony does not show that he had so consulted, or had been attended by, a physician, for such a reason, you are instructed that his answers to these questions were full, true and complete, and you are instructed to disregard this defense.

8.

In case the last preceding instruction is refused plaintiff requests the following:

Defendant further defends on the ground that Mr. Dobler committed a breach of warranty in that he did not make full, complete and true answers to question No. 13 in Part I of the application and question No. 14 in Part II of the application.

Question No. 13 in Part I is as follows:

A. When did you last consult a physician and for what reason? To which Mr. Dobler answered: "Do not remember, years ago."

Question No. 14 in Part II is as follows: A. How long since you last consulted, or were attended by a physician? Give date? B. State name and address of such physician. C. For what disease or ailment? D. Give name and address of each and every physician who has prescribed for or attended you within the past

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(All of page 74 stricken out.—JOHN J. DE HAVEN, Judge.)

five years and for what diseases or ailments and dates. E. Have you had any illness, diseases or medical attendance not stated above?

To which Mr. Dobler answered: "Do not remember, long time ago."

I charge you that the words used in application for a policy of insurance are to be constructed and understood in their plain, ordinary and popular sense. They must be given the force and effect that the parties using them intended that they should have. If the words used in an application or policy of insurance are reasonably and fairly capable of two meanings, they must be given the meaning that will uphold and support the contract rather than the one that would forfeit it. If you find that under a reasonable interpretation of these questions that they might have been understood by Mr. Dobler as called only for a disclosure of these instances, if any, in which Mr. Dobler had consulted, or had been attended by, a physician on account of some disease or

ailment that he had or supposed he had, you might find that his answers to these questions are full, true and complete, and your findings should be in favor of the plaintiff as to this defense.

9.

Defendant also defends on the ground that Mr. Dobler committed a breach of warranty in that he did not make a full, complete and true answer to the question: A. State fully your occupation, employment or trade, and if more than one, state all and duties. B. How long have you been so engaged?

To which Mr. Dobler answered: A. "Mining superintendent Cornucopia Mines, Oregon." B. "Five years."

I charge you that this defense is not established and you will wholly disregard it.

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(All of page 75 stricken out.—JOHN J. DE HAVEN, Judge.)

10.

Should the Court submit the question of whether Mr. Dobler committed any breach of warranty by not making full, complete and true answers to any question in the application plaintiff requests the following instruction:

I charge you that notwithstanding that you find that Mr. Dobler did not make full, complete and true answer to questions contained in the application, and which is made a matter of defense by defendant, never-

theless, if defendant became informed by Mr. Dobler's failure to make a full, complete and true answer to any such question or questions, and in what respect it was not full, complete and true, and thereafter with full knowledge that said answer was not full, complete and true, furnished plaintiff with blank forms of proofs of death to be prepared by herself and other parties at expense and trouble to herself; or, of after it has become fully informed that Mr. Dobler had not made full, complete and true answers to any such questions it asked of plaintiff further and additional proofs, then I charge you that defendant, by its conduct, waived any and all right it might have had to make a defense on the ground that Mr. Dobler's answer to such question was not full, complete and true.

11.

In case the Court submits the question of whether Mr. Dobler committed any breach or breaches of warranty by not making full, complete and true answers to any question or questions in the application, plaintiff requests the following instruction:

I charge you that in arriving at the meaning of any word, phrase, sentence or sentences in the application that has been introduced in evidence, you may take into

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(All of page 76 stricken out.—JOHN J. DE HAVEN, Judge.)

consideration the purpose of the application, namely, that it is an application for a policy of life insurance;

that the information sought by the questions was information that would throw light on the question of whether or not the applicant would be a desirable or undesirable risk. You may read any word or phrase or sentence in connection with the wording of any other part of the application that would tend to qualify the meaning of such a word, phrase or sentence, or make clear the meaning of such a word, phrase or sentence. "It is an elementary canon of interpretation that particular words may not be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them."

You may also consider that the printed language of the application is the language of the insurance company. If there is any ambiguity as to what information is called for by a question, the ambiguity must be resolved in favor of the plaintiff. For the purpose of upholding the policy of insurance against a forfeiture claimed by the defendant, the meaning of the words or sentences must be strictly construed against the defendant company. In case of doubt as to the meaning of any question, word or phrase or sentence, the language is not only to be strictly construed against the defendant but it must be construed in the sense in which the defendant company knew that the applicant might understand or would naturally understand it. So that if you find any question contained in the application is ambiguous or fairly susceptible to two or more mean-

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(All of page 77 stricken out.—JOHN J. DE HAVEN, Judge.)

ings, and that Mr. Dobler's answer thereto was full, true and correct in his understanding of the question, that his understanding of the question was a fair and reasonable one then you must find that there is no breach of warranty as to such question?

12.

Plaintiff requests the Court to give the further and following instruction:

I instruct you that you are the sole judges of the facts in this case under the instructions I have given you. You are the sole judges as to the credibility of the witnesses. If a witness has willfully sworn falsely to a material fact in this case, you are at liberty to disregard his entire testimony unless he has been corroborated as to that or any other fact to which he has testified. It does not follow merely because a witness makes an untrue statement that his entire testimony is to be disregarded. This must depend upon the motive of the witness. If he intentionally swears falsely as to one matter, the jury may properly reject his whole testimony as unworthy of credit. But if he makes a false statement through mistake or misapprehension, the jury ought not to disregard his testimony altogether and they should not consider the circumstance further than as showing inaccuracy of memory or judgment on the part of the witness.

And thereupon, the defendant requested the Court to instruct the jury as follows, and to give to said jury the following instructions, to wit:

1.

You are instructed that the contract upon which the plaintiff is seeking to recover consists of the policy of insurance and the written application therefor. By the terms of said written application said Frederick C. Dobler agreed that all of the answers and statements contained in said application were warranted to be full, complete, material and true, and that if any of the answers or statements made were not full, complete and true, then the policy should be void.

2.

You are instructed that all of the terms and provisions of said written application and policy are valid and binding upon the plaintiff in this action.

3.

And you are instructed that if you find from the evidence that if the first premium upon said policy of insurance was not paid in accordance with the terms of said written application and policy of insurance, your verdict should be for the defendant.

4.

It is contended by the defendant that by the terms of said written application and policy of insurance said Frederick C. Dobler was asked and made answer to certain questions in relation to his occupation and as to

how long he had been so engaged, and that the answers so made were not full, complete and true. You are instructed that if you find from the evidence that such questions were so asked and answered by said Frederick C. Dobler and that the answers so made by him were not full, complete and true, your verdict should be for the defendant.

5.

It is contended by defendant that by the terms of said written application and policy of insurance said Frederick C. Dobler was asked and made answer to certain questions in relation to other assurance which he had at the time of making the application here sued upon, and that the answers so made were not full, complete and true. You are instructed that if you find from the evidence that such questions were so asked and answered by said Frederick C. Dobler and that the answers so made by him were not full, complete and true, your verdict should be for the defendant.

6.

It is contended by the defendant that by the terms of said written application and policy of insurance said Frederick C. Dobler was asked and made answer to certain questions in relation to his having consulted or been attended by a physician, and that the answers so made were not full, complete and true. You are instructed that if you find from the evidence that such questions were so asked and answered by said Frederick C. Dobler and that the answers so made by him were

not full, complete and true, your verdict should be for the defendant.

7.

You are further instructed that if you find from the evidence that any of the answers made by said Frederick C. Dobler to the questions above referred to were not full, complete and true, your verdict should be for the defendant. That it is of no consequence and makes no difference whether such answers were material, or in any way increased the risk, or in any way contributed to the loss, as by the express terms of the contract sued upon it was agreed that all of such questions and answers were material and that agreement is binding upon said plaintiff in this case.

8.

It is admitted that at the time of the making of the written application in question by said Frederick C. Dobler, said Frederick C. Dobler held the policy of insurance in the Travelers' Insurance Company, for five thousand dollars herein evidence. You are instructed that said policy in the Travelers' Insurance Company constituted other assurance within the terms and meaning of the written application and policy sued upon.

INSTRUCTIONS.

The COURT. (Orally.) Gentlemen of the Jury:

This is an action by the plaintiff, Priscilla Dobler, upon a policy of insurance issued by the defendant the Mutual Reserve Life Insurance Company of New York City, in the sum of ten thousand dollars. It is provided

in the policy that if it should mature by death within twenty years from its date while in due force under its original premium paying conditions, there should be payable to the beneficiary thereunder as a mortuary dividend an amount equal to one-third of the premium paid thereon. There was one premium paid on this policy. If plaintiff is entitled to recover under the instructions I shall give you, she is entitled to a verdict at your hands in the sum of $10,127.26, with interest thereon from the 17th day of July, 1903, at the rate of six per cent per annum.

The first question, gentlemen, for you to determine is whether the policy of insurance sued upon, and which has been introduced in evidence before you, whether that was ever delivered as the contract of the company. By the terms of that policy, it is provided among other things "this policy of assurance witnesseth that in consideration of the application therefor, hereby made a part of this contract, and of three hundred and eighty-one dollars and eighty cents to be actually paid in cash as a first premium on or before the delivery hereof, Mutual Reserve Life Insurance Company promises to pay ten thousand dollars to Priscilla Dobler (mother) of Sumner, County of Pierce, State of Washington, if living at the time of the death of Frederick C. Dobler of Cornucopia, county of Baker, State of Oregon, herein called the assured. This policy shall not take effect until it is delivered to the assured in person, during his lifetime and while in good health, and the first payment is made in cash, except where a binding receipt signed by the

treasurer of the company, is issued prior to such delivery, and then only in accordance with the terms of such receipt.

I think the evidence shows, gentlemen, that the first premium was not paid in cash; and it also shows that the policy when delivered, was not accompanied by a binding receipt, signed by the treasurer of the company, and issued prior to such delivery; so, gentlemen, it is competent for the company to waive this provision of the policy, the same as any other provision in the policy; and the question for you to determine is whether when the policy was delivered to the deceased by the agent of the defendant, the deceased had any notice that it was not the intention of the company to be governed by the policy; in other words, that the policy was not delivered as a binding contract; when the agent of the company took from him a part of his money and a note for the balance and delivered to him the policy, was it the understanding of the parties that the policy was delivered as the contract of the company? If so, then it would be a binding contract, and this particular provision which I have read to you in regard to the payment of cash would be deemed waived. If, gentlemen, you find that there was such a waiver, and that the company through its agent delivered this policy as its contract, your next inquiry will be whether or not there was any breach of warranty?

You are instructed that the contract upon which the plaintiff is seeking to recover consists of the policy of assurance and the written application therefor. By

the terms of such written application, said Frederick C. Dobler agreed that all of the answers and statements contained in said application were warranted to be full, complete, material and true, and that if any answers or statements made were not full, complete or true, then the policy should be void.

You are instructed that all of the terms and provisions of such written application and policy are valid and binding upon the plaintiff in this action.

You are further instructed that if you find from the evidence that any answers made by said Frederick C. Dobler to the questions above referred to were not full, complete and true, your verdict should be for the defendant. It is of no consequence, and makes no difference whether such answers were material, in any way increased the risk or in any way affected the matter, as by the strict terms of the contract sued upon it was agreed that all of such questions and answers were material, and that agreement is binding upon the plaintiff in this case.

I now call your attention, gentlemen, to the particular defense set up by the defendant; that is, the particular grounds upon which the defendant resists the payment of this policy, that is, assuming that it was delivered as the policy of the company.

The defendant defends on the ground that Frederick C. Dobler committed a breach of warranty in that he did not make full, complete and true answers to the question numbered ten, in Part One, of the application, which question is in these words: "Have you now any

assurance on your life? If so, where, when taken, for what amount and what kinds of policies? Have you any other assurance?" To which Mr. Dobler made this answer: "$5,000; Washington Life, May, 1900; amount, $5,000; combination bond; none."

Defendant claims that this answer was not full, complete and true in that Mr. Dobler was carrying at that time a $5,000 accident policy in the Travelers' Insurance Company of Hartford, Conn., and also another $1,000 policy—

Mr. WARBURTON.—That is not admitted.

The COURT.—Well, it is admitted by plaintiff that Frederick C. Dobler was carrying a $5,000 accident insurance policy in the Travelers' Insurance Company of Hartford; and it is also claimed by defendant that he was carrying an additional $1,000 accident policy, which fact is disputed by the plaintiff here.

In determining the question whether or not this answer was full, complete and true within the meaning of this application, you will take into consideration the circumstances surrounding the parties at the time the application was signed; any discussion that then took place between the deceased and the agent of the defendant company as to the meaning of the question asked, "Have you any assurance on your life," and if you find from the evidence that a doubt might reasonably and fairly be entertained as to whether this question called for a disclosure of any purely accident insurance that Mr. Dobler then carried, and that Mr. Dobler understood

that it did not call for the disclosure of purely accident insurance, but only called for the disclosure of life insurance; and if such was the understanding of the defendant's agent at that time soliciting the insurance and receiving the application, then you may conclude this answer to this question was full, complete and true, and you will consider the defense no further; that is, you will understand whether he thought in view of all of the circumstances then surrounding him, that he was then making a full, true and complete written answer to the question as understood by the parties thereto.

The defendant further defends on the ground that Mr. Dobler committed a breach of warranty in that he did not make full, true and complete answers to question thirteen, in Part One of the application, and to question fourteen in Part Two of the application.

Question thirteen, in Part One, is as follows: "When did you last consult a physician and for what reason?" To which Mr. Dobler answered: "Don't remember; years ago." Question fourteen in Part Two is as follows: "How long since you last consulted, or were attended by a physician? Give date?" To which Mr. Dobler answered: "Don't remember; long time ago." You are instructed that these questions called for a disclosure of any and all those instances, if any, in which Mr. Dobler, the deceased, had consulted or had been attended by a physician for some disease or ailment that he had, or supposed that he had; and unless the evidence in the case is such as to show that he had consulted or had

been attended by a physician for some ailment which he had or supposed he had, you are instructed that those answers to those questions were full, true and complete, and you may disregard that defense.

The defendant also defends on the ground that the deceased committed a breach of warranty in that he did not make a full, true and complete answer to the question: "State fully your occupation, employment or trade, and if more than one, state them all and duties. B. How long have you been so engaged?" To which Mr. Dobler answered: "First. Mining Superintendent, Cornucopia Mines, Oregon"; B. "Five years." As I understand the evidence, gentlemen, it is not sufficient to establish this defense; and you are instructed to disregard it.

You, gentlemen, are the sole judges of the facts in this case under the instructions which I have given you; you are the sole judges of the credibility of the witnesses who have given evidence. If any witness has willfully sworn falsely to any material fact in this case, you are at liberty to disregard his entire testimony, unless he has been corroborated as to the entire fact to which he has testified in other words, it is for you determine from the evidence in any case what facts you believe have been established by the testimony to which you have listened, and then applying to those facts the law which I have endeavored to give you; and you will return such verdict as you think just and proper in the premises.

There are two forms of verdict which will be handed to you. If you find for the plaintiff, your verdict will be in this form: "We, the jury in the above-entitled cause, find for the plaintiff in the sum of $10,127.26, with interest from July 17th, 1903." If you upon the other hand find for the defendant, your verdict will be in this form: "We, the jury in the above-entitled cause, find for the defendant." Whatever verdict you find will be signed by your foreman.

You may retire and consider upon your verdict.

Jury retired.

Mr. PARSONS.—As I understand, your Honor did not give the instructions as they were requested.

The COURT.—No; I did not give them, and you can take a general exception to the refusal of the Court to give each one of the instructions requested by you. I did give some of them and some of them I did not; but you may take a general exception to the effect that you except to the refusal of the Court to give each one of the instructions requested. Now, then, regarding the instructions given, have you any exceptions to specifically take to those, other than would be covered by your general exception?

Mr. PARSONS.—Yes, sir, we have. And if your Honor please, I will take an exception to each paragraph of the Court's charge, excepting those which I have requested for the defendant.

Mr. WARBURTON.—I do not think that will be proper.

The COURT.—He has a right to take his exception in his own language.

Mr. PARSONS.—Yes; but the difficulty is I have not followed the charge to see which forms or requests you gave them from.

The COURT.—Well, you may make your exception as full as you can.

Mr. PARSONS.—The defendant excepts to that paragraph of the Court's charge to the jury beginning as follows: "This is an action brought by the plaintiff Priscilla Dobler upon a policy of insurance issued by the defendant," to and including the words "with interest thereon from the 17th day of July, 1903, at the rate of six per cent per annum."

The defendant further excepts to that paragraph of the Court's charge to the jury beginning with the words "defendant further defends on the ground that Frederick C. Dobler committed a breach of warranty in that he did not make full, complete and true answers to question ten, in Part One, of the application," and down to the words and including them: "You will consider the defense no further."

The defendant excepts to that paragraph of the charge of the Court to the jury beginning with the words "defendant further defends on the ground that Mr. Dobler committed a breach of warranty in that he did not make full, complete and true answers to question thirteen, in Part One, of the application, and question four-

teen in Part Two of the application," down to and including the words "you may disregard that defense."

The defendant excepts to that paragraph of the Court's charge to the jury, beginning with the words "defendant further defends on the ground that Mr. Dobler committed a breach of warranty in that he did not make full true and complete answer to question two in part one," and down to and including the words, "you are instructed to disregard it."

The defendant further excepts to the refusal of the Court to give that paragraph of the instruction requested by defendant in words as follows:

You are instructed that if you find from the evidence that if the first premium upon said policy of insurance was not paid in accordance with the terms of said written application and policy of insurance, your verdict should be for the defendant.

The COURT.—You may sumply say No. 3 requested by the defendant, No. 4 requested by defendant and so on.

Mr. PARSONS.—Very well. Defendant excepts to the refusal of the Court to give the instruction requested by defendant and numbered four.

Defendant excepts to the refusal of the Court to give the instruction requested by defendant and numbered five.

Defendant excepts to the refusal of the Court to give the instruction requested by defendant and numbered six.

Defendant excepts to the refusal of the Court to give the instruction requested by defendant and numbered eight.

And to the refusal of the Court to give each one of those instructions.

* * * * * * * * * *

Mr. WARBURTON.—The plaintiff excepts to the refusal of the Court to give plaintiff's requested instruction No. 3.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested instruction No. 5.

Plaintiff excepts to the refusal of the Court to give plaintiff's requested instruction No. 8.

Plaintiff excepts to the refusal of the Court to give plaintiff's requested instruction No. 10.

Plaintiff excepts to the refusal of the Court to give plaintiff's requested instruction No. 11.

* * * * * * * * * *

Case closed.

NOTE.—Matter between asterisks stricken out.—JOHN J. DE HAVEN, Judge.

Plaintiff's Exhibit "A."

(Copy.)

MUTUAL RESERVE LIFE INSURANCE COMPANY.

No. 1004047. Amount.

Age, 32. $10,000.00

Frederick A. Burnham, President.

Home Office: Mutual Reserve Building, New York, U. S. A.

Chief Office for Great Britain 7-9 Cannon St., London, E. C.

Direction Generale pour le Continent de L'Europe 8 Rue Halevy, Paris.

This policy of insurance witnesseth that in consideration of the application herefor, hereby made a part of this Contract, and of three hundred and eighty-one dollars and eighty cents, to be actually paid in cash as a First Premium on or before the delivery hereto, Mutual Reserve Life Insurance Company promises to pay ten thousand dollars to Priscilla Dobler (mother) of Sumner, County of Pierce, State of Washington, if living at the time of the death of Frederick C. Dobler, of Cornucopia, County of Baker, State of Oregon, herein called the Assured (otherwise, to the executors or administrators of the Assured, subject to evidence of the death of said Assured within one year from date hereof.

If the said Assured survive the said year, and shall, on or before the seventh day of November, of each and every succeeding year, to and including the twentieth year from date hereof, unless death occur sooner, pay

to the said Company the like amount of premium, then this Contract shall be renewed and thereafter continued as a Contract of Whole Life Assurance, and upon the decease of the said Assured the said Company will pay the principal sum as above provided.

The benefits and provisions on the second and third pages hereof are hereby made a part of this Contract.

The said Mutual Reserve Life Insurance Company has caused this Policy to be signed by its President or Vice-President, and Secretary or Assistant Secretary, at the City of New York, this seventh day of November, one thousand nine hundred and two.

(Signed) F. A. BURNHAM,
President.

P. L. JONES,
Asst. Secretary.

Examined by ——— (?) One Year Term and Limited Payment.

Premiums may be paid in cash or 33⅓ % by annual Premium Note and balance in Cash.

Second Page.

BENEFITS AND PROVISIONS.

When Contract Takes Effect.

I. This Policy shall not take effect until it is delivered to the Assured in person during his lifetime and while in good health, and the first payment is made in cash, except where a binding receipt signed by the Treasurer of the Company, is issued prior to such deliv-

ery, and then only in accordance with the terms of such receipt.

Payments, Waivers.

II. Each premium is due and payable at the Home Office of the Company in the City of New York, but may be paid elsewhere to a duly authorized Collector, but only in exchange for the Company's official receipt signed by its Treasurer. If any premium shall not be paid when due, then this Policy shall expire and terminate, except as herein provided. No contract, alteration, or discharge of contracts, waiver of forfeitures, or granting of permits or credits, shall be valid, unless the same shall be in writing, signed by the President or Vice-President and one other officer of the Company.

Notices and Premiums.

III. Should this Policy be renewed as a contract of whole Life Assurance, the net premium hereunder for succeeding years will be that of a date and age one year greater than that of issue, but without increase in the premium payable by the Assured. A notice addressed to the Assured, or other person designated by him, at the last postoffice address appearing upon the books of the Company, shall be deemed sufficient notice, and affidavit of, or proof of, addressing and mailing the same according to the usual course of business of the Company shall be taken and admitted as evidence and shall constitute and be held to be conclusive proof of due notice to said Assured and every person accepting or acquiring any interest hereunder.

Grace in Payment of Premiums.

IV. A grace of thirty days, during which the Policy remains in full force, will be allowed in payment of all premiums, except the first, subject to an interest charge at the rate of five per cent per annum.

Reinstatement.

V. The Assured may secure reinstatement of this policy at any time after the nonpayment of any premium, under the following conditions: written application to the Home Office with evidence of assurability satisfactory to the Company, payment of premiums from the date to which premiums were duly paid to the date of reinstatement, with interest at the rate of five per cent per annum, and payment of reinstatement of any loans including payment of any interest due and unpaid.

Risks not Assumed.

VI. Death of the Assured, caused by any violation of law, or by his own hand, whether sane or insane, voluntary or involuntary, is not a risk assumed under this Contract within three years from its date. Should the death of the Assured occur while actually engaged in any Military or Naval Service, or within six months from the date of wounds received in such service, there shall be payable subject to all the conditions of this Contract, only a sum equal to the amount of the Premiums paid hereon, not exceeding the face of the Policy.

Assignments.

VII. Permission is given the Assured to assign this Policy or change the beneficiary hereunder, but the

same shall not be valid unless made with the written consent of the Company and in accordance with its rules and shall be subordinate to any premium or other lien which may exist in favor of the Company hereunder. The Company shall not be responsible for the validity of any assignment.

Proofs of Death.

VIII. The proofs of death by which this Contract matures must be furnished to the Company at its Home Office in the city of New York, which proofs shall comprise evidence satisfactory to the Executive Committee of the causes and manner of death, and that it occurred during the continuance of this Policy, and must comply fully with the Company's forms in use and requirements made at the time of the death of the Assured. No action at law or suit in equity shall be maintained hereon, or recovery had, unless the same is commenced within one year from the day of the death of the Assured, without reference to the time of furnishing proofs of death, any Statute of Limitations to the contrary notwithstanding. Upon the maturity of this Contract there shall be deducted from the sum payable hereunder any indebtedness of the assured or the beneficiary of the Company, including the balance, if any, of premiums for the then Policy year.

Installment Benefits.

IX. The Assured may change the mode of payment of the proceeds of this Policy as a death claim, at any time, if not then assigned, from payment in one sum, as provided on the first page, to payment by annual installments, as stated below.

The following tables are based on a policy of $1,000, and will apply pro rata to the amount payable under this Policy, provided the amount is not less than $1,000; if the amount is less than $1,000, these installment benefits shall not apply, but the proceeds of this Policy will be payable in one sum only:

Annual installments limited to the number stated below. Any number from two to twenty-two may be selected by the Assured:

Number of Installments—Amount of Each Installment.

25	20	19	18	17	16	15	14	13	12
$56	$65	$67	$70	$73	$77	$81	$85	$91	$97

11	10	9	8	7	6	5	4	3	2
$104	$113	$124	$138	$155	$179	$211	$261	$343	$507

Illustration.—If payment is to be made by 20 installments, the amount of each installment will be $65 for each $1,000 of assurance.

Third Page.

BENEFITS AND PROVISIONS.

Incontestability.

X. This Policy having been in continuous force from its date of issue, after two full annual premiums have been paid hereon, shall thereafter, under the limitations for provision VI, be incontestable, except for fraud, non-payment of premiums as herein provided, or for misstatement of the age of the Assured in the application therefor, subject to the provisions hereof.

Cash Loans.

XI. Cash loans amy be obtained on the sole security of this policy at any time after it has been in force three

full years, upon application in writing to the Home Office of the Company, and subject to the terms of its loan agreement. The amount of loan available at any time is stated below and includes any previous loan then unpaid. Interest will be at the rate of five per cent per annum in advance.

Surrender Options.

XII. After this Policy has been in force three full years, the cash value based on the number of full years' premiums that have been paid, less any indebtedness to the Company, will be available for one of the following purposes:

Paid-up Assurance.

1. This Policy, upon surrender while still in force, and the written request of the Assured, will be continued by the Company without payment of further premiums participation in surplus or the right of securing loans, for such an amount of assurance (the same to be subject to the conditions of this Policy), payable at the death of the Assured as the last cash value determined as above will purchase; and this Policy shall thereafter be payable only for such reduced amount.

Cash Value.

2. Upon the surrender and cancellation of this Policy at the end of the third or any completed Policy year there-

after, the Assured may withdraw the value, determined as above in cash.

Automatic Nonforfeiture.

3. If any premium is unpaid when due, so long as the aggregate indebtedness under the terms of this Policy is less than the Cash Value, the amount so due and subsequent premiums, with interest thereon at the rate of five per cent. per annum, compounded annually, shall, without action of the Assured, become a loan as if made under Provision XI, and shall constitute a first lien against the Policy in favor of the Company, and this assurance shall automatically continue in force with right to the Assured to resume premium payments hereunder, without medical re-examination; but whenever said indebtedness shall exceed said Cash Value, this Policy shall, without action or notice by the Company, become and remain wholly null and void.

N. B.—Values will, under the above provisions, if all premiums have been fully paid in cash, and there is no indebtedness to the Company, be as follows for each One Thousand Dollars of assurance:

To Find the Full Cash, Loan or Paid-up Value of this Policy, Multiply by 10.

End of Year.	20 Payment. Cash Value.	$1000. Age 32 Loan Value.	Paid-up Assurance.	Extended Assurance. Yrs.	Days.
1	x x	x x	x x		30
2	x x	x x	x x		30
3	$30	$64	$100	2	317
4	52	87	157	4	155
5	75	111	214	5	343
6	100	136	271	7	117
7	126	162	328	8	288
8	152	188	385	10	116
9	180	216	442	12	186
10	209	243	500	15	320
11	236	270	550	19	137
12	264	299	600	23	10
13	293	328	650	26	286
14	323	359	700	30	299
15	355	391	750	35	131
16	388	424	800	40	239
17	422	458	850	For life.	
18	457	494	900	For life.	
19	493	531	950	For life.	
20	531	543	1000	For life.	

Age 32. 20 Yr. Lim. Pay.

OPTIONS.

The accumulation period under this Policy ends 20 years from its date. If the Assured be then living, and premiums duly paid, this Policy may be continued or

surrendered by the assured under one of the following options:

1. Continue Policy as herein provided and receive the Cash surplus then apportioned by the Company.

2. Continue Policy as herein provided and apply the cash surplus then apportioned by the Company as a single Premium to purchase additional assurance, subject to the conditions of policy and satisfactory evidence of good health.

3. Convert the Policy into an endowment payable at such age as the Cash value, including cash surplus, determines.

4. Discontinue policy and receive in Cash its entire surrender value, including the cash surplus then apportioned.

5. If assured elects to continue this policy beyond the Accumulation period, under one of the three options first named above, no further dividend shall be apportioned to it excepting at the end of each period of five years thereafter.

This Policy participates in surplus only as herein provided, and any indebtedness of the assured or beneficiary hereunder shall be deducted from any values, surplus or dividends arising under the provisions of this policy.

SURVIVORSHIP-BONUS.

It is agreed with the Assured hereunder that the sum of One Dollar per thousand of Assurance from the first and each succeeding annual cash premium payment made within twenty years hereafter on policies of similar plan

and form hereto, issued by the said Company between the first and last days inclusive, of the year of original issue of this policy, shall constitute a survivorship-bonus fund, and at the expiration of twenty years from the last day of said year, that portion of said fund and its earnings arising from contributions thereto by policies issued as above which terminate by death of nonpayment of premiums thereon within twenty years from their date, shall be divided among the Assured under such of said policies as have continued in force under their original premium paying conditions throughout the full period aforesaid who are then living, proportioned to the amount of assurance held by each, the same to be an additional cash dividend hereunder.

Premium Return.—If this Policy matures by death within twenty years from its date while in due force under its original premium paying conditions, there shall be payable to the beneficiary herein named as a Mortuary Dividend an amount equal to one-third the premiums paid thereon.

No. 10040047.

Always give Number of Policy when writing to the Office.

MUTUAL RESERVE LIFE INSURANCE COMPANY.

Frederick A. Burnham, President.

Mutual Reserve Building, New York.

Limited Payment Policy.

FREDERICK C. DOBLER,

Date, November 7th, 1902.

Amount of Policy, $10,000.00.

Policy-holders must send to the New York Office of the Company prompt notice of any change in Postoffice address.

Filed U. S. Circuit Court, District of Washington, July 25, 1904. A. Reeves Ayres, Clerk.

Plaintiff's Exhibit "B."

(Copy.)

APPLICATION.

Part 1 of Application.

To Mutual Reserve Life Insurance Company, of New York City.

Frederick A. Burnham, President.

1. Full name of applicant: Frederick Cornelius Dobler.

Number and street.

City or town: Cornucopia.

County: Baker.

State: Oregon.

2. A. State fully your occupation, employment or trade; and if more than one, state them all and duties?

Mine superintendent. Cornucopia Mines, Oregon.

B. How long have you been so engaged? Five years.

3. Married or single.

4. Are you now, and have you been in good health throughout the past twelve months, and from all ailments, diseases, weakness and infirmity? Yes, except Yes.

5. Amount applied for? $10,000.

Plan of policy desired. State fully. Ex Spea. 20 pay Life Anticipated surplus.

6. How are premiums to be paid? Annually or semi-annually? Annually. Rate 254.54/100.

7. Assurance payable in one sum or installments? One sum. If installments, how many. (No answer.)

8. State full name, age and relationship or person for whose benefit the assurance is desired.

Name of Beneficiary in full. Priscilla Dobler. 2d Estate. Residence: Sumpter, Wash. Relationship, Mother. Age, 52.

9. Your age, place, and date of birth?

Age nearest birthday, 32. Place of birth, Buffalo Co., Wis. Ella. County Buffalo. State, Wis. Day, 15. Month, Oct. Year, 1870.

10. Have you any assurance on your life? If so, where, when taken, for what amount, and what kinds of policies?

Name of company or association: 5000; Washington Life. Date, ——; issued May, 1900. Amount, 5,000. Combination bond.

Have you any other assurance? None.

11. Has any proposal or application to assure your life, or for membership, ever been made by any company, association or agent, which has been postponed or declined or upon which a policy or certificate of membership has not been received by you in person for the full amount and time, and at the rate applied for? Answer Yes or No. A. No. If yes, state every company, association, society or agent, giving every date and every cause.

12. Is any proposal or application to assure your life or for membership in any company of association now pending, or has any such proposal or application been made upon which for any reason whatsoever, a certificate or policy has not been issued? If yes, state each and every case.

No.

13. A. When did you last consult a physician, and for what reason? A. Do not remember.

B. Give name and address of last physician consulted. A. Years ago.

14. Has any physician given an unfavorable opinion upon your life with reference to life assurance or otherwise? If so, state every such case, and full particulars in every case?

A. No.

15. Have you been an inmate of or treated or prescribed for at any infirmary, sanitarium, institute, asylum, or hospital. If so, where? When? Duration? For what cause? State expressly each and every case?

A. No.

16. Have you ever applied for or received a pension or sick benefits from the government, society or corporation? If so, state fully the reason therefor and the amount.

A. No.

Name of father? Wm. Dobler.

Maiden name of Mother? Priscilla Harris.

17. State your family history.

Father: Age, if living, 57; condition of health, good; age at death, blank; cause of death, blank; duration of illness, blank.

Mother: Age, if living, 52; condition of health, good; age at death, blank; cause of death, blank; duration of illness, blank.

Brothers: How many have you had, 3; number living, 3; ages and conditions of health; 31-26-20; good; number dead, blank; age at death, blank; cause of death, blank; duration of illness, blank.

Sisters: How many have you had, 4; number living, 4; ages and conditions of health, 35, 28, 23, 18; good; number dead, age at death, cause of death, and duration of illness, blank.

Age at death of father's father, 52.

Age at death of father's mother, 30.

Age at death of mother's father, 62.

Age at death of mother's mother, 48.

Have you either of your parents, husband or wife, brothers or sisters, or any member of your household, now, or ever had, or been afflicted with consumption, cancer, gout, scrofula, insanity, or any pulmonary

complaint? If so give full particulars of each case.

A. No.

18. What amount was paid on signing this application?

A. $———. Nothing. Binding receipt issued No. ———. Date, ———.

I hereby agree that the answers and statements contained in parts I and II of this application, by whomsoever written are warranted to be full, complete, material and true, and that this agreement, together with this application, are hereby made part of any policy that may be issued hereon; that if any of the answers or statements made are not full, complete and true, or if any condition or agreement shall not be fulfilled as required herein, or by such policy, then the policy issued hereon shall be null and void, and all money paid thereon shall be forfeited to said company; that the person soliciting or taking this application, and also the medical examiner, shall be the agents of the applicant as to all statements and answers in this application, and no statement or answers made or received by any person, or to the company shall be binding on the company unless such statements or answers be reduced to writing and contained in this application; that the principles and methods employed by the Company in any distribution of surplus, apportionment of profits or cost belonging to any policy that may be issued hereunder or accepted and ratified by and for every person who shall have or claim any interest in the contract. And I hereby expressly waive all provisions of law now existing or that may hereafter exist, preventing any physician from disclosing any information acquired in a professional

capacity, or otherwise, or rendering him incompetent as a witness in any way whatever, and for myself and for any other person accepting or acquiring any interest in such policy, authorize and request any such physician to testify concerning my health and physical condition. I further agree not to use alcoholic or malt liquors to excess, or habitually use opium, hydrate of chloral or other narcotics (tobacco excepted); and that under no circumstances shall the assurance hereby applied for be in force or the company incur any liability hereunder until the actual payment in cash of the first premium, while I am in good health, in exchange for a receipt on the company's authorized form, signed by its treasurer, and then only in accordance with the terms of said receipt, and after the application shall have been received and approved by the company at its home office and a policy actually issued hereon.

And I further expressly warrant that I have read the questions and answers contained in this application in parts I and II hereof, and each and all of them, and that said answers and each and all of them are my answers.

And I do further expressly warrant that I have not, nor has any one on my behalf, made to the agent or medical examiner, or to any other person, any answers to the questions contained in this application, other than or different from the written answers as contained in this application.

And I do further expressly warrant that I have not, nor has anyone on my behalf given to the agent or

medical examiner, or to any other person, any information, or stated any facts in any way contradictory of or inconsistent with the truth of the answers as written in this application in parts I and II thereof and of each and every one of the same, it being distinctly and specifically understood and agreed that the validity of any policy to be issued hereon is and shall be dependent upon the truth or falsity of the written answers contained in this application in parts I and II thereof to the questions therein propounded.

Signature of applicant in full:

FREDERICK CORNELIUS DOBLER.

Full name of beneficiary:

PRISCILLA DOBLER.

The applicant may sign for the beneficiary.

Names and residences of three personal friends:

THOS. TURNER, Cornucopia, Ore.

P. BOSCHE, Baker City, Ore.

TOM WRIGHT UNION.

I hereby certify that the above are full and correct answers as made by the applicant and that I believe the same to be full and true and the risk to be safely assurable and recommend the same; also that I witnessed the signature, which I certify to be genuine.

WM. HYDE STALKER,

Solicitor.

Dated at Cornucopia, Ore., 10/20/1902.

Solicitor's P. O. Address, Baker City, Ore.

Examination blank handed to Dr. Saunders.

IMPORTANT.—The Agent should fill in this memorandum before handing blank to Examiner. Amount applied for? $10,000.00. Number of policies asked for? I. How are the premiums to be paid? Annually or semi-annually? Annually.

Part II of Application for Policy of Assurance in the Mutual Reserve Life Insurance Company. 1004047.

Frederick A. Burnham, President.

1. A. Name of the applicant in full? Frederick Cornelius Dobler.

   B. Residence? Cornucopia, Oregon.

   C. Age? 33.

   D. Occupation? Mining Superintendent.

   Any other occupation? None.

2. Are you now and have you always been in good health, and free from all ailments, diseases, weakness and infirmity? Yes.

3. Has your weight increased or decreased any in the past three years? If so, state how much.

   A. No.

4. Are your habits at the present time, and have they always been sober and temperate?

   A. Yes.

5. Are you now, or have you ever been engaged in any way in the manufacture or sale of spirituous or malt liquors, or wines? If so, how and when?

   A. No.

6. Do you use, or have you ever used ardent spirits, wine or malt liquor? If so, to what extent—aver-

age quantity each day? State fully. Do not answer occasionally, moderately or temperately.

A. None at all.

7. Do you use opium, morphine, hydrate of chloral or other narcotics, or have you ever used them (tobacco excepted)? If yes, state every date when.

A. No.

8. Has change of climate or location ever been sought or advised, or have you visited any place for the benefit of or on account of your health? If so, when, where and for what? Answer fully, giving every date.

A. No.

9. A. Are you ruptured? If so, of what kind, single or double; is it reducible, and is a suitable truss worn?

A. No.

B. If ruptured, do you agree to always year a suitable truss?

No answer.

10. Have you ever been or are you now subject or predisposed to cough, expectoration, difficulty of breathing, or palpitation?

A. No.

11. Have you ever had pneumonia, spitting or raising of blood, or other hemorrhages?

A. No.

12. a. Have you ever had Rheumatic Fever, or Inflammatory Rheumatism?

A. No.

B. If so, state every attack and how many, and if what years.

b. Blank.

c. Duration and severity.

(Blank.)

13. Have you ever had any illness, local disease, injury, mental or nervous disease or infirmity, syphilis, or any disease, weakness, or ailment of the head, throat, lungs, heart, stomach, liver, kidneys, bladder, or any disease or infirmity whatever? If yes, state nature, date, duration, and severity of each and every attack and whether fully recovered?

A. No.

14. a. How long since you last consulted, or were attended by a physician, give date?

A. Don't remember; long time ago.

b. State address and name of such physician. Blank.

c. For what disease or ailment? (Blank.)

d. Give name and address of each any every physician who has prescribed for or attended you within the past five years, and for what disease or ailments and date. (Answer blank.)

e. Have you had any illness, disease or medical attendance not stated above? (Answer blank.)

15. Have you ever taken any specific form of treatment for any liquor or narcotic habit? If so, state which, date of treatment and where.

A. No.

16. If the applicant be a woman state fully: (All questions and answers thereto are blank.)

I do hereby agree and warrant that the foregoing answers, written to the above questions, are my answers, and are full and complete, correct and true, and that the same shall be made a part of my application for policy of assurance, in the Mutual Reserve Life Insurance Company, and that I am the person that signed Part I of this application to said company.

And I do hereby repeat as to the foregoing answers contained in Part II of this application each and every warranty and agreement contained and recited at the end of part I hereof.

Signature of Applicant: F. C. DOBLER.

Signature of Medical Examiner as witness:

I. N. SAUNDERS, M. D.

Part III of Application for Policy of Assurance.

Medical Examiner's Report of Examination.

Of the application who is known by me to be the person represented in part II of this application, and who signed the same in my presence.

1. Race, white.

Weight, 176 lbs.

Height, 6 feet.

Girth of waist, 34 inches.

Figure, good.

General appearance, good.

Physical defects or deformities, no.

Age nearest birthday, 32 years.

Does the applicant appear older than stated? No.

Do you personally know the applicant? Yes.

If so, how long? 2 years.

If not known by you are you satisfied as to identity?

Girth of chest under the vest:

Forced inspiration, 40 inches.

Forced expiration, 36 inches.

Eyes, gray.

Hair, brown.

Complexion, dark.

2. State the rate and character of the pulse.

A. Sitting, 69. Standing, 73.

B. It is regular? Yes.

C. Is it free from intermission? Yes.

3. A. Is the respiratory murmur clear and distinct over every part of both lungs? A. Yes.

B. Is the respiration full and easy and regular? B. Yes.

C. Are the organs of respiration free from any indication of disease? C. Yes.

D. Number of respiration per minute? D. 16.

4. A. Is the action of the heart uniform, free and steady? A. Yes.

B. Are its sounds and rhythm regular and normal? B. Yes.

C. Are the heart and blood vessels free from any indication of disease? C. Yes.

5. Condition of the urine?

A. Sp. Gr. 1021.

B. Reaction normal.

C. Albumen? No.

D. Sugar? No.

E. Result of examination by microscope if necessary. (Blank.)

6. Was urine voided in your presence? Ans. Yes.

7. A. Do you find the *application* in perfect health and safely assurable? A. Yes.

B. Considering physical condition, age, occupation, habits, family history, and locality, do you rate the risk first-class, good or fair? B. First-class.

C. If not first-class, state fully why you accord a lower rating? (Blank.)

D. Do you advise that a policy be issued? D. Yes.

8. Compared with the average of lives of the same age and sex, do you believe the applicant likely to live the full expectancy? A. Yes.

9. Everything considered, what is the maximum amount of insurance that in your judgment can safely be issued upon this life? A. Unlimited.

10. Is the applicant in any way related to you? Ans. No.

I certify that I reviewed with the applicant all the answers to questions contained in Part II in this application, which are in my handwriting, and the applicant acknowledged that they were fully understood, and were full, complete, and true; that I have this day made a thorough personal examination in private of said ap-

plicant, and that the above statements and answers were written by me, and are a complete and correct report of such examination.

Signature of Examiner, I. N. SANDERS, M. D.

Address, Cornucopia, Oreg.

Examined at Cornucopia, Ore., this 20th day of October, 1902.

Please state name of agent requesting this examination:

W. H. STIKLER,

Confidential communications.

Plaintiff's Exhibit "C."

(Copy.)

(April 5, 1904. Exhibit "C" for Identification. Wm. T. Kennedy, Notary Public N. Y. Co.)

MUTUAL RESERVE LIFE INSURANCE COMPANY,

OF NEW YORK.

Frederick A. Burnham, President.

Certificate of Loan.

New York City, N. Y., 11/7, 1902.

I hereby request that on each of the first twenty premiums which may become due on my policy applied for in my application dated the 20th day of October, 1902, Mutual Reserve Life Insurance Company, of New York will allow one hundred twenty-seven and 26/100 dollars to remain as a loan, instead of requiring the payment of the same in cash.

And, in consideration of the granting of said request, this certified that there is and shall be due to the order of Mutual Reserve Life Insurance Company, twenty

years from date hereof, or as hereinafter provided, at the Home Office of said Company in the City of New York, State of New York, the said sum of one hundred twenty-seven and 26/100 dollars on account of and as a part of each of the said twenty annual premiums on Policy No. 1004047, which amount I hereby authorize the said Company to indorse on the back of this certificate upon the 7th day of November in each and every year for twenty years, said date being the date of said policy above referred to.

It is agreed and promised: (1) If within two years from the date of said Policy any premium is not paid when due thereunder, this obligation shall become due and enforceable against the undersigned sixty days after the nonpayment of said premium. (2) This obligation, until paid, shall be a lien on said Policy and the assurance thereunder, and shall become due and payable whenever the assured or his beneficiary shall request or avail himself of any payment or benefit under said policy; and in such event or when this obligation becomes due, any such payment or the cash value of such benefit may be used by the Company at its option to apply on this obligation. (3) Said Company is hereby authorized to insert in this instrument the number and date of my policy in said Company after my signature shall have been appended thereto.

(Signed) FREDERICK C. DOBLER.

[Endorsed]: Filed U. S. Circuit Court, District of Washington. July 25, 1904. A. Reeves Ayres, Clerk.

Plaintiff's Exhibit "D."

(Exhibit "A," J. T. D.)

(Copy.)

(On letter-head of Mutual Reserve Life Insurance Company.)

New York, March 11, 1903.

Mr. Levi Ankeny, Pres't First Nat'l Bank, Baker City, Ore.,

Dear Sir: We have been advised by our representatives in Oregon that a note executed by Mr. F. C. Dobler sometime in November last, either in favor of Wm. H. Stalker or the Mutual Reserve Life Insurance Company, had been left at your bank for discount, or for collection.

As some question has arisen as to the final disposition of this note, I will be greatly obliged if you will furnish me with the following information:

1. The date of the note?
2. The amount of the note?
3. Time for which the note had been given?
4. To whose order was note made payable?
5. If the note was finally paid, when, by whom, and to whom?

We also desire to ask if there is a Mr. Parker connected with you bank; and if so, did he receive any instructions, verbally or by letter from Mr. Dobler as to the payment or repudiation of the note?

If the note was finally paid by your bank, and the note is in your possession, will you kindly have a copy forwarded to us?

We will be obliged if you will let us have this information at as early a date as possible, and any expense attending, we shall be glad to reimburse you.

Yours very truly,

(Signed) WILLIAM PORTER,
Comptroller.

Mar. 16, 1903.

Plaintiff's Exhibit "E."

(Exhibit "B." J. T. D.)

(Copy.)

March 16, 1903.

Mutual Reserve Life Insurance Co., 305-7-9 Broadway, N. Y.

Dear Sirs: In answer to yours of 11th will state that we held the Dobler note as collateral to note of W. H. Stalker until it was paid.

The circumstances are as follows: Mr. Stalker presented the note to the writer for discount, but instead of discounting it we made Mr. Stalker a loan, holding the Dobler note as collateral. The amount of the note was $254.54. When we took the note Mr. Dobler was advised of the fact, as it was payable to his own order at this bank, and due Dec. 20th, 1902. Under date of Dec. 18th, he wrote us:

"Enclosed herewith please find my check # 26 for $154.54 to apply on the W. H. Stalker note. Will pay the balance within the next thirty or sixty days, which I think will be satisfactory to Stalker."

The amount received from Dobler paid the Stalker

Note in our favor, and the collateral note was returned to him. Later he brought the note back and we made a loan of $80.00 against the same, again advising Dobler that we held his note as collateral.

Under date of Feby. 15th, Mr. Dobler wrote us: "I enclose herewith for credit to my account (here followed list of checks) $375.20. Kindly take up the Dobler-Stalker note, and send the same to me, and oblige."

This letter was received on Feby. 17th, on which date we charged Dobler's account $101.60 to cover balance on the note, with interest, and canceled and mailed it to him.

Regarding your inquiry about Mr. Parker will state that he is our vice-president. I have spoken to him about the matter, and he remembers having some conversation with Mr. Dobler about the matter, at which time Dobler said he would pay the note when due, but nothing was said about repudiation.

There is no expense connected with our services, and should there be any further information desired we shall take pleasure in furnishing same, if within our knowledge.

Respectfully yours,

J. C. DONNELLY,

Cashier.

P. S.—We have no record of the date of note, or time for which given.

J. T. D., Cash.

Plaintiff's Exhibit "F."

(Exhibit "C." J. T. D.)

(Copy.)

FIRST NATIONAL BANK.

No. 39333.

Baker City, Oregon, Mar. 4, 1903.

Pay to the order of Mutual Reserve Life Ins. Co., $200.00, two hundred dollars.

(Signed) J. T. DONNELLY, Cashier.

To Laidlaw & Co., 14 Wall Street, New York, N. Y:

(Across face of draft): "Not over two hundred, $200."

[Endorsed]: Pay to the order of the Chatham Nat'l Bank, Mutual Reserve Life Insurance Company. Premium % The Chatham Nat'l Bank. Paid. New York. Received by Mar. 10, 1903. S. J. Rogers.

Plaintiff's Exhibit "G."

(Copy.)

Baker City, Ore., March 4, 1903.

Received of Wm. Hyde Stalker draft for $200 payable to the Mutual Reserve Life Ins. Co. and the following notes:

H. O. Meador for $127.30, dated 1/8/03 for 6 mo.

Fred Hopp, for $305.60, dated 1/7/03 for 6 mo.

Frank M. Keght, $265.40, dated 1/6/03, for 6 mo.

on account of net premium on twelve policies in the Mutual Reserve Life Ins. Company as follows: E. A. Tracy, F. C. Dobler, E. H. Masterson, Eli Chandler, C.

M. Collier, W. D. Nash, W. T. Phy, R. T. McHaley, H. O. Meador, L. F. Hopp, F. M. Keght and C. W. Emerson.

(Signed.) MARK T. KADY.

Defendant's Exhibit "A."

(Copy.)

Form B-210.—Local Agents and Brokerage.

MUTUAL RESERVE LIFE INSURANCE COMPANY.

Frederick A. Burnham, President.

This agreement, made the fifteenth day of October, 1902, between the Mutual Reserve Life Insurance Company, of the City of New York, party of the first part, and William H. Stalker, of Baker City, County of Baker, State of Oregon, party of the second part, Witnesseth:

That the said party of the second part is hereby appointed representative of said company for the purpose of procuring applications for assurance therein in the territory embraced in this agreement, and for the further purpose of appointing suitable sub-agents on terms to be approved by the Company, subject to the terms and conditions herein. This appointment is on the following terms and conditions, which are agreed to by each party hereto:

The district in which said party of the second part shall have the right to work shall embrace the States of Oregon, Washington, Idaho and Montana, but the said district is not assigned exclusively to the said party of the second part, and this contract is made subject to the condition that the said Company is, and shall continue to be legally authorized to transact business in said dis-

trict; but should said company not now have such authority, or should such authority be at any time hereafter revoked or otherwise terminated or should said Company for any reason withdraw from said territory, then this contract shall be null and void as to any portion of said district from which said Company shall withdraw or in which said Company shall be without such authority.

The said party of the second part shall possess no authority not herein expressly granted, shall not make, alter or discharge any contract, nor waive forfeitures, and shall receive no further remuneration for any service than is herein provided. It is expressly stipulated that the Company will pay no sum for rent, printing, advertising or any other expense whatever, nor shall any liability whatever be incurred or created by or against said Company unless a written order for such expense or liability, specifically, has been given herefor, by the President or the Executive Committee of the Company, prior to the expense being incurred.

It is expressly understood and agreed that the said party of the second part shall have no authority to accept any premiums due or to be due, after delivery of policy, except in exchange for the Company's official receipt signed by its president, Secretary or Treasurer, furnished to the said party of the second part by the Company.

It is expressly understood and agreed that all moneys received or collected for or in behalf of the Company by

said party of the second part shall be fiduciary trust, and shall not be used by said party of the second part for any personal or other purpose whatever, and shall be immediately, as required by said Company, paid over to it in cash, and that said party of the second part shall promptly return any payments due applicants on account of reduced or declined applications.

The said party of the second part agrees to submit to and abide by the rules, regulations and instructions of said Company, and to devote his entire time and best energy to its service, and occupy and work effiiciently the territory herein assigned, otherwise this agreement to be void and of no effect, and, further, agrees not to divulge the business of the Company or his compensation under this contract to anyone, nor to tender any business to another company without the written consent of the Company.

It is further agreed that all books, records, papers, correspondence, documents and literature of every kind and nature which refer to or contain records of the business transacted or to be transacted hereunder, whether paid for by the Company or by the party of the second part, are, and shall remain, the property of the Company, and are to be delivered up to the Company on demand, under penalty in case of default of forfeiture of all interest in this contract.

The compensation to be allowed the said party of the second part upon new and accepted business secured hereunder shall be as follows:

On Ten Payment Life, Five Year Term Convertible and Ten Year Renewable Term Policies, fifty per cent (50 %).

On Fifteen Payment Life, and Twenty-five Year Term Extendible Policies, Sixty per cent (60 %).

On ordinary Life and Twenty Payment Life Policies, Seventy per cent (70 %).

On Ten Year Endowment Policies Fifty per cent (50 %).

On Fifteen year Endowment Policies, Sixty per cent (60 %).

On Twenty Year Endowment Policies, Seventy per cent (70 %) of the first year's premiums only, when and as received by the Company upon said business in cash it being understood and agreed that the commission on non-participating forms of ordinary Life and Limited Payment Policies shall be ten per cent (10 %) less than as stated above.

It is expressly understood and agreed that no compensation or commission of any kind shall be payable hereunder on any portion of a premium for which the said company shall accept in lieu of cash any premium lien note of whatever character. All other plans are subject to further agreement.

It is also expressly understood and agreed that no compensation or commission allowed under this contract shall be payable to the said party of the second part, except on premiums paid on policies actually issued and delivered to the policy-holder in accordance

with its terms, and under the payment from which the same is to be allowed has been received in cash by the said company.

It is also expressly understood and agreed, that when assurance is affected on the lives of persons who hold policies in the said company, that the commission to be paid upon such business shall be calculated only upon the increase in premium under the new policy over that of the old, should the Assured for any cause forfeit or discontinue the old policy within one year from the date of the issue of the new.

The Company may offset against any claim for compensation under this agreement any amounts payable to other agents on policies secured, under this or any other agreement, and any debt due by said party of the second part to said Company. All advances to or payments made on account of said party of the second part shall be a personal debt due from him to the Company, and the termination of this contract shall not work a release or cancellation of any such debt, but the same shall constitute a lien upon any moneys thereafter becoming due to the said party of the second part, and shall likewise be immediately recoverable from him by the Company.

Either party may terminate this agreement, unless otherwise terminated by its own conditions, by giving to the other notice in writing, personally, or by mail, to that effect. Mailing of notice to the last postoffice address of said party of the second part on the books of

the Company shall be and shall be deemed and held to be, sufficient notice. This contract, or any of the benefits to accrue thereunder shall not be assigned or transferred, either in whole or in part, without the written consent of said Company.

It is further understood and agreed that all previous contracts or agreements made by and with said Company are hereby canceled, but notwithstanding such cancellation the commissions or bonuses of business secured under the same shall be allowed the said party of the second part, during the continuance of this contract, subject to the terms and conditions of said canceled contracts or agreements.

It is further understood and agreed that if the said party of the second part, shall, during any month, fail to tender to said Company applications for assurance to the amount of ——— thousand dollars, which shall be accepted by said Company, this contract shall thereupon cease and terminate, and become, and thereafter be, null and void, at the option of the Company, and any county in the territory of said agent as aforesaid, from which said Company shall not receive any new and accepted business under this contract for the period of sixty days, shall thereafter be known as open territory in which the said Company may appoint another agent; and any business secured by any agent so appointed shall not be subject to the terms of this contract.

It is further agreed, that if any notice, writ, summons, process, complaint, petition, declaration or other

pleading or papers shall, at any time, be served upon or received by the said party of the second part in or concerning any claim, suit, action, or special proceeding against said Mutual Reserve Life Insurance Company, the said party of the second part will, within twenty-four hours next after the service, or receipt thereof, transmit the same by registered mail, to the said Company, at its home office in the City of New York; and in case of any neglect, default or failure to transmit as aforesaid, the said party of the second part will pay, upon demand, to said Company, any and all loss or damage, costs, counsel fees or expenses which may be occasioned by such neglect, default or failure, and will protect and save harmless the said Company, from and against any and every judgment, order or decree, that may be made, had, or taken in or concerning any such claim, suit, action or special proceeding.

It is further agreed: That a bonus of five per cent will be allowed on all business upon which cash settlement is made within fifteen days of date of Policy.

In Witness Whereof, the said Company has caused these presents to be signed by its Executive Committee, and the said party of the second part has hereunto set his hand this fifteenth day of October, 1902.

There were no erasures, alterations or interlineations in the foregoing agreement.

(Signed) WM. HYDE STALKER.
R. B. CANNON,
(Signed) C. C. HOADLEY.
C. E. MABIE.

(No endorsements.)

Defendant's Exhibit No. 1.

(Copy.)

(Exhibit "A." J. E. M.)

7/8/04 (2)

Principal Sum, $5000.00 Premium, $37.50.

ACCIDENT POLICY.

THE TRAVELER'S INSURANCE COMPANY OF HARTFORD, CONN.

Chartered in 1863 as a Stock Life and Accident Insurance Company.

In consideration of the Warranties in the Application for this Policy, and of thirty-seven and 50/100 dollars, does hereby insure Frederick C. Dobler, of Cornucopia, County of Union, State of Oregon, under Classification Ordinary (being a Superintendent Quartz Mine by occupation, for the term of twelve months from noon of March 21, 1902, in the sum of twenty-five dollars per week, against loss of time not exceeding fifty-two

consecutive weeks, resulting from bodily injuries effected during the term of this insurance, through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation above stated. Where such injuries shall not wholly disable the Insured, as above, but shall immediately, continuously and wholly disable him from the performance of one or more important daily duties pertaining to his occupation, the Company will pay to him two-fifths of the indemnity per week above specified, for the period of such partial disability, not exceeding twenty-six consecutive weeks from the date of injury; or where such partial disability shall follow a period of total disability, the indemnity for partial disability shall be paid, but not for more than twenty-six weeks, nor for any such disability extending beyond fifty-two weeks from the date of injury; or if loss by severance at or above the wrist or ankle joint of one entire hand or foot results from such injuries alone within ninety days, will pay insured one-third the principal sum herein named, in lieu of said weekly indemnity, and on such payment, this policy shall cease and be surrendered to said company; or, in event of loss by severance at or above the wrist or ankle joint or two entire hands or feet, or one entire hand and one entire foot, or loss of entire sight of both eyes, solely through injuries aforesaid within ninety days, will pay insured the full principal sum aforesaid,

provided he survives said ninety days. Or if death results from such injuries alone within ninety days, will pay five thousand dollars to Priscilla Dobler (Mother), if surviving; in event of her prior death, to the executors, administrators, or assigns of insured. Provided—

1. If insured is injured in any occupation or exposure classed by this company as more hazardous than that here given, this insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard.

2. This policy shall not take effect unless the premium is paid previous to any accident under which claim is made. The company may cancel this policy at any time by written notice mailed to the insured at the address given in his application therefor, and upon surrender of such canceled policy the unearned portion of the premium therefor shall be payable to the insured upon demand.

3. The company's total liability hereon in any policy year shall not exceed the principal sum hereby insured; therefor, in case of claim for full principal sum, any sums paid as indemnity within such policy-year shall be deducted therefrom.

4. Immediate written notice, with full particulars, and full name and address of insured, is to be given said company at Hartford, Connecticut, of any accident and injury for which claim is made. Unless affirmative proof of death, loss of limb or sight, or duration of disability and of their being the proximate result of ex-

ternal, violent, and accidental means, is so furnished within thirteen months from time of such accident, all claims based thereon shall be forfeited to the company. No legal proceedings for recovery hereunder shall be brought within three months after receipt of proof at this office, nor at all, unless begun within eighteen months from date of alleged accident.

5. This insurance shall not cover injuries of which there is no visible mark on the body, the body itself in case of death not to be deemed such a mark; nor disappearance; nor suicide, sane or insane; nor accident; nor injuries, nor disability, nor death, nor loss of limb or sight, resulting wholly or partly, directly or indirectly, from voluntary over-exertion, or voluntary exposure to unnecessary danger, from intoxication or while intoxicated, from or while violating law, from hernia, from disease in any form, either as a cause or effect from medical or surgical treatment, except amputations necessitated solely by injuries, and made within ninety days after accident, from fits, vertigo, sleep-walking, from any gas, or vapor or poison or contact with poisonous substances, from sunstroke, freezing, duelling, or fighting, war or riot; nor shall it cover the result of injuries, fatal or otherwise, inflicted intentionally by the insured, or by any other person except by burglars or robbers. Nor shall this insurance cover accident, injuries, disability or death, or loss of limb or sight, resulting directly or indirectly from entering or trying to enter or leave a moving conveyance, using steam as

a motive power (except cable and electric street cars), or while being in any part thereof, not provided for occupation for passengers, or while being on a railway bridge or roadbed, railway employees while on duty excepted.

6. This insurance does not cover injuries sustained in any part of Alaska, or the British possessions in America, north of the sixtieth degree of north latitude, and west of the fifty-third degree of longitude west from Washington, D. C.

7. No claim shall be valid in excess of $10,000, nor in excess of $50 weekly indemnity under accident policies, to be paid only at the end of the term of disability for which indemnity shall be payable, nor for indemnity in excess of money value of insured's time. All premiums paid for such excess shall be returned, on demand, to insured or his executors, administrators, or assigns. If the insured carries insurance either in companies or associations, or both, making an aggregate weekly indemnity in excess of the money value of his time, this company shall be liable for only such proportion of insurance against loss of time, or of hand, or foot, or of eyesight, as said money value of his time shall bear to the aggregate of the weeky indemnity of the entire insurance so carried.

8. Any medical advisor of the company shall be allowed, as often as he requires, to examine the person or body of insured in respect to alleged injury or cause of death.

9. Any claim hereunder shall be subject to proof of interest. A copy of any assignment shall be given within thirty days to the company, which shall not be responsible for its validity. No agent has power to waive any condition of this policy.

In witness whereof, The Travelers' Insurance Company has caused this policy to be signed by its president and secretary, and countersigned by G. E. Conklin, District Agent, at Portland, Oregon, this twenty-first day of March, 1902.

(Signed) J. G. BATTERSON,
President.

(Signed) JOHN E. MORRIS, Secretary.

(Signed) G. E. CONKLIN,
Dist. Agent.

The above and foregoing is a true and correct copy of the original policy, 1340413, issued to Frederick C. Dobler as appears by the records and files of this company. Attest:

(Signed) JOHN E. MORRIS.

[Endorsed]: Accident Policy on life of Frederick C. Dobler, No. 1340413. The Travelers' Insurance Company of Hartford, Conn. Date, March 21, 1902. Term, Twelve Months. Amount Insured, $5000. Weekly Indemnity, $25. Premium, $37.50. G. E. Conklin, Dist. Agent, at Portland, Oregon.

Defendant's Exhibit No. 2.

(Copy.)

Form B-341.

Special Receipt No. 7551.

MUTUAL RESERVE LIFE INSURANCE COMPANY.

Mutual Reserve Building, New York.

Frederick A. Burnham, President.

————————, 190——.

Received from ————, ———, dollars, $——— in full for the first ——— Annual Premium on ——— thousand dollars assurance, subject to the terms of the policy and the following conditions and agreements:

First: That the assurance will be in force from the date of the Application, provided the application is approved by the Home Office and a policy issued thereon.

Second: That the Company reserves the absolute right of disapproval of such Application and the Company shall incur no liability under such Application, unless it shall be approved by the Home Office.

Third: That this receipt shall not be vaid if erasures and additions have been made in the printed form; and it will not be valid unless the person to whom it is issued is promptly examined by a regularly appointed Examiner of the Mutual Reserve Life Insurance Company.

Fourth: That after the person to whom this receipt is issued has been so examined, if a policy be not issued on said Application, or examination within sixty days from this date, then, and only in such event, said sum will be returned on surrender of this receipt to this Company.

Fifth: If a note is given in payment of any part of the premium, receipt of which is herein above acknowledged, and if said note be not paid at its maturity, it is understood and agreed that the policy shall then be ipso facto null and void.

MUTUAL RESERVE LIFE INSURANCE COMPANY,
By GEORGE W. HARPER,
Treasurer.

This receipt shall not be valid unless countersigned by an authorized agent of the Company.

To be countersigned by

_____

Agent.

Countersigned:

_____,

Agent.

Defendant's Exhibit No. 3.

(Copy.)

(Exhibit No. 7. Wm. T. Kennedy, Notary Public, Ny. Co.)

New York, April 17, 1903.

Mrs. Priscilla Dobler, Sumner, Washington.

Dear Madam: Responding to request for forms for proofs of death under policy 1004047 issued on the life of Frederick C. Dobler, we hand you without prejudice the blanks which the Company prepares for such purpose.

In case the deceased has been attended by any physician within the past five years in addition to the physician dur-

ing the last illness the extra blank herewith must be filled out and returned with proofs.

Yours very truly,

(Signed) GEORGE W. HARPER,

Treasurer.

Defendant's Exhibit ———.

(Copy.)

Read Carefully the Instructions on Back.

To the Mutual Reserve Life Insurance Company of New York.

Frederick A. Burnham, President.

CLAIMANT'S OATH.

1. a. Name of deceased in full and residence.

   Name, Frederick C. Dobler.

   Res., Cornucopia, Ore.

   b. Place and date of death.

   Place, Cornucopia.

   Date.

2. Number, date, and amount of Policy in the Mutual Reserve Fund Life Association?

   No. 1004047. Date, Nov. 7, 1902. $10,000.00.

3. Claimant's name and Residence?

   Name, Priscilla Dobler, Res., Sumner, Wash.

4. Where had deceased lived since above policy was issued? Cornucopia.

5. a. Had deceased ever changed occupation, residence or climate, or traveled for or on account of his health?

   a. No.

   b. If so, when and for what? State fully.

   b. ———.

6. State the several occupations of deceased since the above policy was issued?

Supt. mine.

7. State the place and date of birth of deceased?

Place of birth, Ella, Wis.

Date of birth. Year, 1870. Month, Oct. Day, 15.

8. From what source of knowledge or information do you fix the place and date of birth? Family record.

9. Name, age, and address of each of the claimants, and relationship to deceased, if any?

Name in full, Priscilla Dobler. Age, 52. Relationship, Mother. Full address of each, Sumner, Wash.

10. In what capacity or by what title do you make the claim? Beneficiary named in policy.

11. If a creditor, state the actual amount of indebtedness due you from the deceased, how and when it accrued? (A sworn statement in detail must be furnished.) ———.

12. How long have you personally known deceased? Since Birth.

13. a. When did health of deceased first begin to be affected? a. ———

b. State fully first symptoms? b. ———.

14. Duration of illness. ———.

15. Remote cause of death? ———.

16. Immediate cause of death? Killed in snowslide.

17. What were the circumstances of the sickness and death of deceased? Give full particulars? ———.

18. What ailments, diseases, illness, weakness, infirmities, disabilities, or injuries has deceased had during the past seven years? State facts fully. ———.

19. Name and address of attending physician during last illness? ———.

20. Name and address of every physician who attended or was consulted, or who prescribed for deceased during the past seven years? ———.

21. a. State distinctly the habits of the deceased with reference to the use of spirituous or fermented liquors?

a. Total abstainer.

b. Did deceased use opium, chloral, or other narcotics?

b. No.

22. a. Had deceased been an inmate of any hospital or asylum during the past seven years? a. No.

b. If so, what hospital or asylum, where located, when and for what? b. ——.

23. Was the death of deceased caused by his own hand or acts or in consequence of a duel, or in violation of any law? No.

24. a. In what other companies or societies, and to what amount in each was life of deceased insured? a Washington Life, $5,000.00. Travelers', $5,000.00.

b. Had deceased any insurance on his life not above mentioned? b. Travelers' (Accident) $1,000.00.

25. a. Was an inquest held or investigation made by any public officer? a. No.

b. If so, give name, address and title of each officer.

b. ———.

c. What was the verdict or decision rendered? c. ———.

A certified copy of all the evidence and verdict or official certificate made as required by law must be furnished as part of this proof.

26. Did deceased make any assignment or will, disposing or changing in any manner, the payment of this insurance? No.

27. Give name and address of five persons (not relatives) who were acquainted with the deceased?

Name.	Occupation.	Residence Street and No.
W. H. Paulhamus,	Farmer,	Sumner, Wash.
B. F. Welch,	Farmer,	Sumner, Wash.
F. W. Morse,	Manufacturer,	Puyallup, Wash.
J. B. Krause,	Jeweler,	Puyallup, Wash.
Robert Montgomery,	Editor,	Sumner, Wash.

28. Give name and address of clergyman or minister who officiated at funeral of deceased? G. A. Landen, Tacoma, Wash.

29. State date when last payment was actually made for dues, or mortuary call, and to whom paid. None.

Claimant's Signature: PRISCILLA DOBLER.

OATH.

State of Washington, } ss.
County of Pierce. }

I, Priscilla Dobler, of Sumner, Wash., the claimant above named, do, on by oath, depose and say, that I am the person who made and subscribed the foregoing answer, and that I have carefully read the above questions

and answers thereto, and understand the same; that each and every of such answer is full, complete and true, and no material fact has been concealed or omitted therefrom, and is made for presentation to the Mutual Reserve Life Insurance Company in making claim for the moneys that may be payable under the above policy.

PRISCILLA DOBLER,
Claimant's Signature.

Subscribed and sworn to before me a notary public, in and for the County and State above named, on this, the 27th day of April, A. D. 1903.

[Notary Seal] J. P. BUNDY,
Notary Public.

(County Clerk's Certificate.)

ATTENDING PHYSICIAN'S OATH.

All Answers must be Made in Physician's Own Handwriting.

1. Your name, residence and postoffice address? W. T. Phy, Baker City, Oregon.
2. How long have you practiced as a physician, and from what college did you graduate and when? A. Six years; Union Medical K. C., Mo. & N. Y. Post Graduate.
3. Name of deceased in full? A. Frederick C. Dobler.
4. Place and date of death? A. Cornucopia, Oregon, March 3d, 1903.
5. How long had you personally known deceased? A. Six years.
6. What had been the several occupations of deceased? Mine superintendent.

7. a. What was age of deceased? A. 32 yrs.

b. From what source of knowledge or information do you fix the age? From statement of deceased.

c. Was he apparently older than age above given? No.

8. When did the health of deceased first begin to be affected? Please give date? A. Good until time of death.

9. a. When did you first attend or practice for deceased, and for what? A. Prescribed at intervals for five yrs.

b. Date of last visit? A. Never had any.

10. a. Had deceased at any time traveled been away from home or changed occupations, residence, or climate on account of health? If so, when and where? A. Not to my knowledge.

b. Was it under your advice or that of any other physician? A. ———.

11. a. State the remote cause of death; if from disease, give the predisposing causes, date of the first appearance of its symptoms, its history, and the symptoms present during its progress? A. None.

b. State the immediate cause of death? A. Accident —snowslide.

12. Had deceased ever had any other disease, acute or chronic, or had he ever had any injury or infirmity of which you have any knowledge or information. If so what and when? A. Not to my knowledge.

13. a. Did deceased use spirituous or fermented liquors, if so, to what extent and with what effect? A. No.

b. Was the death of the deceased, caused, induced, or hastened by the use of spirituous or fermented liquors, opium, or other narcotics? A. No.

14. a. Was the death of the deceased caused by his own hand or acts? A. No.

b. Was the death of the deceased accelerated or aggravated by his own acts? A. No.

15. Was a post-mortem examination made; by whom and with what results? A. None made.

16. a. Have you ever prescribed or attended deceased for any sickness, disease, ailment or injury, other than stated above? A. No.

b. If yes, when and for what. A. ——

17. Give names and postoffice addresses of physicians who have at any time attended or prescribed for deceased? A. Do not know of any.

18. Do you know that the person claimed to be insured by the policy mentioned in the claimant's oath preceding is the the same person you treated as above, and now deceased? A. Yes, Frederick C. Dobler.

(Signed) W. T. PHY, M. D.

OATH.

State of Oregon, }
County of Baker. } ss.

I, W. T. Phy, of Baker City, Oregon, the physician above named having been duly sworn, do, on my oath depose and say, that I am the person who made and subscribed the foregoing answers and that I have carefully

read the above questions and answers thereto and understand the same; that each and every of such answers is full, complete and true, and no material fact has been concealed or omitted therefrom, and is made for presentation to the Mutual Reserve Life Insurance Company in making claim for the moneys that may be payable under the above policy.

W. T. PHY,
Physician's Signature.

Subscribed and sworn to before me, a notary public in and for the County and State above named, on this the 24th day of April, A. D. 1903.

[Seal] WM. S. LEVENS,
Notary Public for Oregon.

OFFICIATING CLERGYMAN'S OATH.

Your name, residence and postoffice address? A. J. R. N. Bell, Baker City, Ore.

Name of deceased in full? Frederick C. Dobler.

Do you know that the person claimed to be insured by the policy mentioned in the claimant's oath preceding is the same person treated as sworn to in the physician's oath and now deceased? A. I know it was Frederick C. Dobler.

How long have you known the deceased? A. Four or five years.

What was the age of the deceased? A. About 32 years.

From what source of knowledge or information do you fix the age? A. From the time that he was initiated in the Elks lodge.

What was the occupation and place of residence of the deceased and date of death? A. Bookkeeper and Mine Superintendent, Cornucopia, Oregon.

Did deceased at any time visit or travel for the benefit of his health; if so when and where? A. Not to my knowledge.

Clergyman's signature, J. R. N. BELL.

OATH.

State of Oregon, } ss.
County of Baker. }

I, J. R. N. Bell, of Baker City, Oregon, the clergyman above named, having been duly sworn, do on my oath depose and say that I am the person who made and subscribed the foregoing answers, and that I have carefully read the above questions and answers thereto and understand the same; that each and every of such answers is full, complete and true, and no material fact has been concealed or omitted therefrom, and is made for presentation to the Mutual Reserve Life Insurance Company in making claims for the moneys that may be payable under the above policy.

J. R. N. BELL,
Clergymen's Signature.

Subscribed and sworn to before me, notary public, in and for the County and State above named on this the 24th day of April, A. D. 1903.

[Seal] WM. S. LEVENS,
Notary Public for Oregon.

FRIEND'S OATH.

(Who must be Responsible Householder.)

Your name, occupation, residence and postoffice address? A. W. S. Levens, Attorney at Law, Baker City, Oregon.

Name of deceased in full? Frederick C. Dobler.

Do you know that the person claimed to be insured by the policy mentioned in the claimant's oath preceding is the same person named in the foregoing physician's and clergyman's oaths, and now deceased. A. The person I am making this oath concerning was in his lifetime Frederick C. Dobler, of Cornucopia, Oregon and is now deceased, having lost his life in a snowslide near Cornucopia, Oregon.

How long have you personally known the deceased? A. Seven or eight months.

What was the age of the deceased? A. Thirty-two years I am informed and believe.

What was the actual occupation and place of residence of the deceased during the past seven years? A. Most of the last seven years I am informed and believe he was bookkeeper and superintendent at the Cornucopia mines.

What disease, ailment, injuries or infirmities has the deceased had or been afflicted with during the past seven years, of which you have any knowledge or information? State particulars fully? A. Was in excellent health as far as I could judge.

Did the deceased use spirituous or fermented liquors, if so to what extent? A. No.

Did the deceased use opium or other narcotics? A. No.

Q. Has the deceased at any time changed occupations or visited or traveled for the benefit of his health; if so, when and where? A. Not to my knowledge.

Are you related to deceased, or have you any interest in the above policy or the proceeds thereof? A. No.

Signature of Friend, W. S. LEVENS.

OATH.

State of Oregon, }
County of Baker. } ss.

I, W. S. Levens of Baker City, Oregon, the friend above named do on my oath depose and say, that I am the person who made and subscribed the foregoing answers, that I have carefully read the above questions and answers thereto, and understand the same; that each and every of such answers is full, complete and true, and no material fact has been concealed or omitted thereon, and is made for presentation to the Mutual Reserve Life Insurance Company in making claim for the moneys that may be payable under the above policy.

W. S. LEVENS,
Friend's Signature.

Subscribed and sworn to before me, a notary public, in and for the county and State above named, on this, the 24th day of April, A. D. 1904.

W. G. DROWLEY,
Notary Public for Oregon.

(Clerk's Certificate.)

UNDERTAKER'S OATH.

Your name, residence and postoffice address? A. Baker City, Ore.

Name of deceased in full? Frederick C. Dobler.

Residence and occupation of deceased? A. Cornucopia; mine superintendent.

What was the age of deceased? A. 32.

Date and place of death of deceased? A. Cornucopia.

Did you inter the deceased? When and where? A. Embalmed and prepared for shipment to Sumner, Wash.

Do you know that the person claimed to be insured by the policy mentioned by the claimant's oath preceding is the same person named in the foregoing physician's and friend's oath and interred by you? A. Yes.

Signature of Undertaker, W. J. PATTERSON.

OATH.

State of Oregon, } ss.
County of Baker. }

I, W. J. Patterson, of Baker City, Oregon, the undertaker above named do on my oath depose and say that

I am the person who made and prescribed the foregoing answers, and that I have carefully read the above questions and answers thereto and understand the same; that each and every of such answers is full, complete and true, and no material fact has been concealed or omitted therefrom; and is made for presentation to the Mutual Reserve Life Insurance Company in making claim for the moneys that may be payable under the above policy.

W. J. PATTERSON.

Subscribed and sworn to before me, a notary public, in and for the county and State above named, on this the 24th day of April, A. D. 1903.

WM. S. LEVENS,
Notary Public for Oregon.

(Clerk's Certificate.)

INSTRUCTIONS.

No. 1. Claimant's oath is to be made by the person legally entitled to receive the money, who must state by what title he or she makes the claim, whether as the beneficiary named in the policy or as executor or administrator of deceased, or as guardian or other legal representative of a minor, or as a trustee, or as assignee. In case of assignment and claim is made by an assignee or by a creditor, a sworn statement of account, in detail, showing insurable interest must be made, and a certified copy of such assignment must be furnished. Executors, administrators and guardians must send exemplified copies of the documents showing their appointments

and certificates of qualification. Trustees, unless named in the policy must furnish proof of their authority. All persons claiming in a representative capacity, must sign with their full title.

No. 2. Attending physician's oath is to be made by the physician attending the deceased in his or her last illness; if more than one physician was employed, the oath of each must be furnished. In case the deceased has been attended by any physician previously the oath of such must be furnished if requested. The entire oath must be in the handwriting of the physician.

No. 3. Clergyman's oath is to be made by the clergyman who officiated at the funeral of the deceased.

No. 4. Friend's oath is to be made by some responsible householder intimately acquainted with the deceased, cognizant of his death, and not interested in the claim.

No. 5. Undertaker's oath is to be made by the undertaker or sexton who interred the deceased. If necessary, it may, with slight change, be executed instead by the person who officiated at the interment. In cases of diseases of the brain, or from insanity, full particulars as to the cause and duration of these diseases, and information as to the habits of deceased will be required.

In case of sudden death where an inquest is held or other official investigation is made, a duly certified copy of all of the evidence taken at such inquest, or upon such investigation, and any verdict or decision rendered or certificate made by any official as required by law, must

be furnished as part of the proofs required by the company.

Every question must be distinctly and fully answered; and the company reserves the right to ask any further questions deemed necessary under the circumstances of any particular case.

Each certificate must be sworn to before an officer duly authorized to administer oaths, and his authority, and the genuineness of his signature must be attested by the clerk of a court of record.

If the oath or declaration be administered in a foreign country the official character of the person administering the same, or of the clerk or other officer of the court certifying thereto must be authenticated by the consul or minister of the United States residing in such foreign country.

[Endorsed]: Exhibit "E" for Identification April 5, 1904.

WM. T. KENNEDY,
Notary Public, N. Y. Co.

Filed U. S. Circuit Court, District of Washington. Jul. 25, 1904. A. Reeves Ayres, Clerk.

Defendant's Exhibit No. 5.

(Copy.)

B. H. THE PEOPLE'S POLICY.
D. S

The Travelers' Insurance Company of Hartford, Conn. Principal Sum,$1,000.

Does hereby insure, in the sum specified in the following schedule, the person whose name is written upon the

stub hereinafter mentioned, bearing even date and number herewith, and made a part of this contract, against bodily injuries effected through external, violent and accidental means.

(a) While riding as a passenger and being actually in or upon any railway passenger car provided by a common carrier for the use of passengers, using steam, cable or electricity as a motive power, or

(b) In a passenger elevator, or

(c) While traveling as a passenger on board of a steam vessel of any regular line for the transportation of passengers, or

(d) Which are caused by the burning of a building while the insured is therein, or

(e) which are inflicted by burglars or robbers while perpetrating a burglary or robbery, or.

(f) which are caused by being run over or struck by moving vehicles or street cars, while a pedestrian, to wit:

If any one of the following disabilities shall result from such injuries within ninety days from the date of accident.

For Loss of Life (principal sum of Policy).....$1,000
Or Loss of Both Hands by severance at or above wrist..... 1,000
Or for Loss of Both Feet by severance at or above the ankle..... 1,000
Or for Loss of One Hand and One Foot at those places..... 1,000

Or for Loss of Entire Sight of Both Eyes, if irrecoverably lost.... 1,000

Or for Loss of Either Hand by severance at or above the wrist..... 400

Or for Loss of Either Foot by severance at or above the ankle..... 400

Or for Loss of Sight of One Eye, if irrecoverably lost..... 200

The indemnity for loss of life shall be payable to the beneficiary named in the stub forming part of this contract, or where the beneficiary is either not named therein, or shall have died before the insured, then to his executors, administrators or assigns. Indemnity for the other disabilities named in the schedule shall be payable to the insured, his executors, administrators, or assigns.

Insurance under this policy is subject to the following conditions:

1. No claim hereunder shall be valid unless immediately written notice with full particulars and full name and address of the insured is given to the company at Hartford, Connecticut, of any accident and injury for which claim is made, nor unless thereafter affirmative proof thereof is given to the company at Hartford, aforesaid, within seven months from the date of accident and injury. No legal proceeding for a recovery hereunder shall be brought within three months after receipt of proof at the office of the company, aforesaid, nor at all

unless begun within eighteen months from the date of alleged accident.

2. This insurance shall not cover disappearance nor suicide, sane or insane, nor accident, nor death, nor loss of limb or sight, resulting wholly or partly directly or indirectly from intoxication, or while intoxicated, from or while violating the law, from disease in any form, from medical or surgical treatment (except amputations necessitated solely by injuries and made within ninety days after accident), from fits, vertigo, sleep-walking, gas or vapor, or poison, or contact with poisonous substance, from sunstroke or freezing, duelling or fighting, war or riot. Nor shall this insurance cover accidental injuries or death resulting directly or indirectly from voluntary exposure to unnecessary danger, or injuries, fatal or otherwise, inflicted intentionally by the insured or by any other person, except by burglars or robbers. Nor shall this insurance cover accidental injuries or death resulting directly or indirectly from entering or trying to enter or leave a moving conveyance using steam as a motive power (except cable and electric street cars), or happening while being in any part thereof not provided for the occupation of passengers.

3. This insurance shall not cover injuries sustained in any part of Alaska or the British possessions in America north of the sixtieth degree of north latitude. Nor shall it apply to or cover any injuries, fatal or non-

fatal sustained by a volunteer fireman or member of a paid fire department, while in the performance of duty; nor apply to or cover, at any time, any person who is under sixteen or over seventy years of age, or maimed, crippled or deformed, or bereft of reason, sight or hearing.

Any payment made under the terms of this policy shall be a complete satisfaction of all obligations hereunder, and shall effect a termination hereof, and under no circumstances shall more than one thousand dollars ($1,000) be paid hereunder.

Any medical advisor of the company shall be allowed to examine the person or body of the insured, in respect to any claim made hereunder, as often as such advisor may require.

No one but an executive officer of the company at the home office shall have power to waive any condition of this policy, nor shall notice to any agent, nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver or change in this policy.

The insurance hereunder is for the term of one year from the date of issue, as hereinafter stated (except as herein otherwise provided), and is limited to one such policy for each holder, but this policy may be canceled by the company at any time, by written notice mailed to the insured at the address given herein.

This policy shall be valid only when issued to a paid subscriber to Public Opinion, such subscriber to be within the age limit, and not subject to any of the infirmities

or deformities hereinbefore mentioned; and the company shall be liable hereunder only in the event that at the time the accident under which claim may be made shall occur, the said paid subscription shall be in effect.

No claim shall be valid unless the provisions of this policy are complied with by the insured and beneficiary hereunder.

F. C. DOBLER,

Signature of Insured. Date of Issue,

Cornucopia, Oregon, Jan. 6, 1902.

City and State.

Not valid unless the stub attached hereto is properly filled out and mailed to home office of The Travelers' Insurance Company as provided herein.

In witness whereof, The Travelers' Insurance Company has caused this policy to be signed by its president and secretary. B. H. 2422.

(Signed) S. C. DUNHAM,

President.

JOHN E. MORRIS, Secretary.

Ed. Oct., 1902; Dec. 10, 1902.

[Endorsed]: Accident Policy on life of F. C. Dobler. No. B. H. 2422. The Travelers' Insurance Company of Hartford, Conn. Date, January 6, 1903. Principal Sum, $1,000.

Filed U. S. Circuit Court, District of Washington. Jul. 25, 1904. A. Reeves Ayres, Clerk.

(Copy of letter accompanying policy.)

(Letter-head of The Public Opinion Publishing Co.)

32 Waverly Place, New York,

Jan. 6, 1903.

Mr. F. C. Dobler, Cornucopia, Oregon.

Dear Sir: We beg to thank you for your subscription and had you herewith policy No. 2422. Your signature must appear on the first line of the stub and also on the bottom of the policy.

Underneath your own name and address on the stub fill in the name and address of the person who is to receive the insurance money; then detach the stub and forward it to the Travelers' Insurance Company of Hartford, Conn. Keep your policy in a safe place where it cannot be destroyed.

The value of this kind of a policy is from three to four dollars. Its superiority over the ordinary policy may be easily seen by comparing it with any policy which can be bought at a railway station at four cents per day per thousand dollars.

You will find Public Opinion very helpful. You may mention this offer to any one of your friends whom you know never to have been a subscriber, and he may accept the same terms provided his remittance is sent in through you.

Yours respectfully,

(Signed) PUBLIC OPINION PUB. CO.

HAC.

[Endorsed]: Filed U. S. Circuit Court, District of Washington. July 5th, 1904. A. Reeves Ayres, Clerk.

And thereupon, be it further remembered, that thereafter, and on said July 25th, A. D. 1904, the said jury returned into open court and rendered their verdict herein in favor of said plaintiff, and against said defendant, for and in the sum of ten thousand one hundred twenty-seven and 26/100 dollars, ($10,127.26), together with interest thereon at the rate of six per cent per cent per annum from the 17th day of July, A. D. 1903.

And thereafter, be it further remembered; that on the 26th day of July, A. D. 1904, judgment was entered in said cause in favor of said plaintiff, and against said defendant in the sum of ten thousand seven hundred forty-seven and 54/100 dollars ($10,747.54), together with interest thereon from the 26th day of July, A. D. 1904, at the rate of six per cent per annum, together with her costs and disbursements in said action, to be taxed by the clerk of said court.

And be it further remembered, that thereafter, and on the 28th day of July, A. D. 1904, in pursuance of the stipulation of the parties, it was ordered by the Court that the defendant have up to and including the 27th day of August, A. D. 1904, in which to prepare, serve and file, its bill of exceptions in said action.

United States of America,
District of Washington, } ss.
Western Division.

And now, on this 12th day of September, 1904, the foregoing bill of exceptions having been duly and regularly presented to me;

I, John J. De Haven, the undersigned, acting as Judge of the United States Circuit Court for the District of Washington, Western Division, before whom the above-entitled cause was tried, do hereby certify:

That the same having been duly examined and found correct, and it appearing that said bill of exceptions was regularly and seasonably filed and a copy thereof served upon plaintiff's attorneys, the same is this day settled, allowed, signed and sealed as the bill of exceptions in said cause.

I do further certify that the foregoing bill of exceptions and statement of facts contains all of the material facts, matters and proceedings heretofore occurring in said cause not already a part of the record in said cause, and that the same contains all of the evidence given at said trial, and all of the instructions given by the Court to the jury, together with all of the instructions requested by the defendant to be given to the jury and refused, together with all objections and exceptions made or taken thereto, and that the matters, proceedings and things embodied and set forth in said bill of exceptions are all of the matters, proceed-

ings and things and the whole thereof, occurring in said cause;

Said statement or bill of exceptions consisting of one bound volume containing 152 pages, together with Plaintiff's Exhibits "A," "B," "C," "D," "E," "F," and "G," and Defendant's Exhibits "A," 1, 2, 3, 4, and 5, copies of which are embodied in the foregoing bill of exceptions, which said exhibits were offered, received and read in evidence upon the trial of said cause, and that the same are hereby made a part of said bill of exceptions.

(Signed) JOHN J. DE HAVEN,
Judge.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK,
Defendant.
No. 970.

Notice of Filing Bill of Exceptions.

To the Above-named Plaintiff Priscilla Dobler, and Stanton Warburton and John H. McDaniels, Her Attorneys:

You will please take notice that said defendant, the Mutual Reserve Life Insurance Company, of New York,

has this day filed in the above-entitled cause and court its proposed bill of exceptions, a copy of which is herewith served upon you.

Dated at Tacoma, Washington, this 26th day of August, 1904.

PARSONS, PARSONS & PARSONS,
Attorneys for Defendant.

Received a copy of the foregoing notice together with a copy of the proposed bill of exceptions therein referred to, at Tacoma, Washington, this 26th day of August, 1904.

S. WARBURTON,
J. H. McDANIELS,
Attorneys for Plaintiff.

[Endorsed]: Filed U. S. Circuit Court, District of Washington. Aug. 26, 1904. A. Reeves Ayres, Clerk. Saml. D. Bridges, Deputy.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK,
Defendant.
No. 970.

Assignment of Errors.

Comes now said defendant, the Mutual Reserve Life Insurance Company, of New York, a corporation, by Par-

sons, Parsons & Parsons, its attorneys, and says, that in the record and proceedings in the above-entitled cause and in the judgment entered therein on the 26th day of July 1904, there is manifest error in this, to wit:

1. The Court erred in admitting in evidence that portion of the testimony of the witness William H. Stalker, as follows:

Interrogatory 19. Did you assist Frederick C. Dobler in the preparation of said application; if so, how?

A. I did. I instructed him as to the answers called for by the questions contained in the application on information furnished me by him, and informed him that the correct answers to such questions would be, on the information given me.

2. The Court erred in admitting in evidence that portion of the testimony of the witness William H. Stalker, as follows:

Interrogatory 22. Referring to question 10 in said application part I, were you aware and informed by Frederick C. Dobler at the time of preparing the application mentioned, that he, the said Frederick C. Dobler, was carrying $5,000.00 accident policy in the Travelers' Insurance Company of Hartford, Connecticut, state fully?

A. I was. He told me he was carrying $5,000 accident insurance in the Travelers' Insurance Company of Hartford, Connecticut and he also called my attention to a policy for $1,000 accident insurance that he carried in another company (the name of which I do not remember.) I was also aware of the fact that he carried $5,000.00 in the Washington Life of New York; he took

particular pains to explain to me all his business affairs in connection with insurance. I told him that the $5,000 accident insurance likewise the $1,000 accident policy was not called for in answer to question 10 in application of Mutual Reserve Life Insurance Company.

3. The Court erred in admitting in evidence that portion of the testimony of the witness William H. Stalker, as follows:

Interrogatory No. 25: State whether or not you were authorized by defendant company to accept notes in payment of first premiums on policies solicited by and delivered through you?

A. While I had no express authority it was my constant practice to take notes for first premiums, and I know that the company was well aware of the fact that I was doing this.

4. The Court erred in admitting in evidence that portion of the testimony of the witness William H. Stalker, as follows:

Interrogatory No. 26: Was it the custom on your part and known to the company and its managers and general agent to deliver policies solicited by and delivered through you on receipt by you of note or notes in payment of the first premium thereon. State fully your practice in this connection as known to the defendant company.

A. I have answered this question in the previous interrogatory and repeat the answer as given above.

5. The Court erred in admitting in evidence that portion of the testimony of the witness William H. Stalker, as follows:

Interrogatory 23: If your answer to the preceding interrogatory discloses that you wrote in the answers in the application, part 1, state whether or not it was understood between you and the said Frederick C. Dobler that the answers so written in by you were full true and complete answers to the respective questions according to the information given you by said Frederick Dobler?

A. It was so understood between Mr. Dobler and myself. There was no disposition on the part of Mr. Dobler to conceal anything, neither was there on my part, because I could not see and cannot see now, why the accident insurance carried by Mr. Dobler would affect the issuing of the policy in question.

6. The Court erred in denying defendant's motion, made after the close of the evidence: To direct a verdict for the defendant on the ground that it appears by the undisputed evidence that in the application for the policy in question there were two distinct breaches of warranty: First, as to other insurance held by the applicant at the time the application was made; and second, as to the applicant having consulted a physician.

7. The Court erred in giving to the jury the following instruction:

"This is an action by the plaintiff Priscilla Dobler, upon a policy of insurance issued by the defendant, the Mutual Reserve Life Insurance Company of New York City, in the sum of ten thousand dollars. It is provided in the policy that if it should mature by death within twenty years from its date while due in force under its original premium paying conditions, there should be pay-

able to the beneficiary thereunder as a mortuary dividend an amount equal to one-third of the premium paid thereon. There was one premium paid on this policy. If plaintiff is entitled to recover under the instructions, I shall give you, she is entitled to a verdict at your hands in the sum of $10,127.26, with interest thereon from the 17th day of July, 1903, at the rate of six per cent per annum."

8. The Court erred in giving to the jury the following instruction:

"The defendant defends on the ground that Frederick C. Dobler committed a breach of warranty in that he did not make full, complete and true answers to the question numbered ten in part one, of the application, which question is in these words: 'Have you now any assurance on your life? If so where, when taken, for what amount and what kind of policies? Have you any other assurance?' To which Mr. Dobler made this answer: '$5,000; Washington Life. May, 1900. Amount, $5,000. Combination Bond. None.' Defendant claims that this answer was not full, complete and true, in that Mr. Dobler was carrying at that time a $5,000 accident policy in the Travelers' Insurance Company of Hartford, Connecticut, and also another $1,000 policy. Well, it is admitted by plaintiff that Frederick C. Dobler was carrying a $5,000 accident insurance policy, in the Travelers' Insurance Company of Hartford, and it is also claimed by defendant that he was carrying an additional $1,000 accident policy, which fact is disputed by the plaintiff here. In determining the question whether or not this answer was

full complete and true within the meaning of this application, you will take into consideration the circumstances surrounding the parties at the time the application was signed; any discussion that then took place between the deceased and the agent of the defendant company as to the meaning of the question asked, 'Have you any assurance on your life,' and if you find from the evidence that a doubt might reasonably and fairly be entertained as to whether this question called for disclosure of any purely accident insurance that Mr. Dobler then carried, and that Mr. Dobler understood that it did not call for the disclosure of purely accident insurance, but only called for the disclosure of life insurance; and if such was the understanding of the defendant's agent at that time soliciting the insurance and receiving the application, then you may conclude this answer to this question was full, complete and true, and you will consider the evidence no further."

9. The Court erred in giving to the jury the following instruction:

"The defendant further defends on the ground that Mr. Dobler committed a breach of warranty in that he did not make full, true and complete answers to question thirteen, in Part One of the application, and to question fourteen in Part Two of the application. Question thirteen, in Part One, is as follows: 'When did you last consult a physician and for what reason?' To which Mr. Dobler answered: 'Don't remember; years ago.' Question fourteen in Part Two is as follows: 'How long since you consulted, or were attended by a physician? Give

date?' To which Mr. Dobler answered: 'Don't remember; long time ago.' You are instructed that these questions called for a disclosure of any and all those instances, if any, in which Mr. Dobler, the deceased, had consulted or been attended by a physician for some disease or ailment that he had, or supposed that he had; and unless the evidence in the case is such as to show that he had consulted or been attended by a physician for some ailment which he had or supposed he had, you are instructed that those answers to those questions were full, true and complete, and you may disregard that evidence."

10. The Court erred in giving the jury the following instruction:

"The defendant also defends on the ground that the deceased committed a breach of warranty in that he did not make a full, true and complete answer to the question: 'State fully your occupation, employment or trade, and if more than one, state them all and duties. B. How long have you been so engaged?' To which Mr. Dobler answered: 'First. Mining Superintendent, Cornucopia Mines, Oregon; B. Five years.' As I understand the evidence, gentlemen, it is not sufficient to establish this defense; and you are instructed to disregard it."

11. The Court erred in refusing to give to the jury the following instructions requested by defendant:

"3. You are instructed that if you find from the evidence that the first premium upon said policy of insurance was not paid in accordance with the terms of said written application and policy of insurance, your verdict should be for the defendant."

12. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

"4. It is contended by the defendant that by the terms of said written application and policy of insurance said Frederick C. Dobler was asked and made answer to certain questions in relation to his occupation and as to how long he had been so engaged, and that the answers so made were not full, complete and true. You are instructed that if you find from the evidence that such questions were so asked and answered by said Frederick C. Dobler, and that the answers so made by him were not full, complete and true, your verdict should be for the defendant."

13. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

"5. It is contended by defendant that by the terms of said written application and policy of insurance said Frederick C. Dobler was asked and made answer to certain questions in relation to other assurance, which he had at the time of making the application here sued upon, and that the answers so made were not full, complete and true. You are instructed that if you find from the evidence that such questions were so asked and answered by said Frederick C. Dobler, and that the answers so made by him were not full, complete and true, your verdict should be for the defendant."

14. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

"6. It is contended by the defendant that by the terms of said written application and policy of insurance said Frederick C. Dobler was asked and made answer to cer-

tain questions in relation to his having consulted or been attended by a physician, and that the answers so made were not full, complete and true. You are instructed that if you find from the evidence that such questions were so asked and answered by said Frederick C. Dobler, and that the answers so made by him were not full, complete and true, your verdict should be for the defendant."

15. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

"8. It is admitted that at the time of the making of the written application in question by said Frederick C. Dobler, said Frederick C. Dobler held the policy of insurance in the Travelers' Insurance Company for five thousand dollars, here in evidence. You are instructed that said policy in the Travelers' Insurance Company constituted other assurance within the terms and meaning of the written application and policy sued upon."

16. The Court erred in making, rendering and entering judgment for the plaintiff and against the defendant in this action, which said judgment was so entered upon the 26th day of July, 1904.

Each of the foregoing errors will be relied upon by the defendant for the reversal of the said judgment in the United States Circuit Court of Appeals for the Ninth Circuit.

Wherefore said defendant prays that this, its assignment of errors, be entered in this cause; and that upon the hearing of this cause in the United States Circuit

Court of Appeals for the Ninth Circuit it be adjudged that said judgment be in all things reversed.

PARSONS, PARSONS & PARSONS,
Attorneys for said Defendant.

[Endorsed]: Filed August 27th, 1904. A. Reeves Ayres, Clerk.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK,
Defendant.
No. 970.

Petition for Writ of Error.

To the Honorable Judges of the Circuit Court of the United States, Ninth Circuit, District of Washington, Western Division:

Your petitioner, the Mutual Reserve Life Insurance Company, of New York, a corporation, the defendant above named, considering itself aggrieved by the decision and judgment of the court aforesaid, made and entered herein, on the twenty-sixth day of July, 1904, does hereby pray for a writ of error from said decision and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that said writ may be allowed, and that a transcript and record of the proceedings upon

which said judgment was rendered, duly authenticated, together with the assignment of errors annexed thereto, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, that said judgment may be vacated and reversed for the reasons set forth in said assignment of errors annexed hereto.

PARSONS, PARSONS & PARSONS,
Attorneys for Defendant.

Now, on this 27th day of August, 1904, the writ of error herein prayed for is allowed. And it is ordered that the amount of supersedeas bond be fixed in the sum of twelve thousand five hundred dollars.

C. H. HANFORD,
District Judge sitting as Circuit Judge.

[Endorsed]: Filed August 27th, 1904. A. Reeves Ayres, Clerk.

In the Circuit Court of the United States, District of Washington, Western Division.

PRISCILLA DOBLER,
Plaintiff,
vs.
MUTUAL RESERVE LIFE INSURANCE COMPANY, OF NEW YORK (a Corporation),
Defendant.
No. 970.

Bond on Writ of Error.

Know all men by these presents, that the Fidelity and Deposit Company of Maryland, a corporation, created

and existing under and by virtue of the laws of the State of Maryland, and authorized by its charter and articles of incorporation to execute and guarantee appeal bonds and undertakings, having complied with all the requirements of the laws of the State of Washington, and being duly authorized to transact business in said State, as surety for the above-named Mutual Reserve Life Insurance Company, of New York, a corporation, is held and firmly bound unto the above-named Priscilla Dobler, in the sum of twelve thousand five hundred dollars ($12,500.00), to be paid to the said Priscilla Dobler, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

Dated August 27th, 1904.

Whereas, lately, at a session of the Circuit Court of the United States, Ninth Circuit, District of Washington, Western Division, in a suit pending in said court between Priscilla Dobler, plaintiff, and Mutual Reserve Life Insurance Company, of New York, a corporation, defendant, a judgment was on the 26th day of July, 1904, rendered in favor of said plaintiff and against said defendant in the sum of ten thousand seven hundred and forty-seven and 54 100 dollars ($10,747.54), and costs of said action; and the said Mutual Reserve Life Insurance Company of New York having obtained from said Court a writ of error to reverse said judgment in the aforesaid suit, and a citation directed to the aforesaid plaintiff, Priscilla Dobler, citing and admonishing her to be in the

United States Circuit Court of Appeals for the Ninth Circuit to be holden where said court shall be held.

Now, therefore, the condition of this obligation is such that if the said Mutual Reserve Life Insurance Company of New York shall prosecute its said writ to effect, and answer all damages and costs, if it fail to make its plea good, then this obligation shall be void; otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Bond Co. Seal] By DAVID P. EASTMAN,

Member of Seattle Local Board of Directors.

Attest by: GEO. B. LITTLEFIELD,

JOHN A. WHALLEY & CO.,

General Agents.

The foregoing bond is approved.

August 27th, 1904.

C. H. HANFORD,

United States District Judge, Presiding in said Circuit Court.

[Endorsed]: Filed August 27, 1904. A. Reeves Ayres, Clerk.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States, Ninth Circuit, District of Washington, Western Division, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said Circuit Court, before you, or some of you, Priscilla Dobler, plaintiff, and Mutual Reserve Life Insurance Company of New York, defendant, a manifest error hath happened to the great damage of the said Mutual Reserve Life Insurance Company, of New York, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court in the city of San Francisco, State of California, together with this writ, so that you have the same at the said place within thirty days from the date of this writ in the said court to be then and there held, that the record and proceedings aforesaid be inspected and the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 27th day of August, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-ninth.

[Court Seal] A. REEVES AYRES,
Clerk of the United States Circuit Court, District of Washington.

[Endorsed]: Filed August 27th, 1904. A. Reeves Ayres, Clerk.

Clerk's Certificate to Transcript.

United States of America,
District of Washington. } ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the District of Washington, do hereby certify the foregoing typewritten pages to contain a full, true and correct copy of the record and proceedings had in said court in said cause as the originals thereof appear on file and of record in the office of the clerk of the said court at the city of Tacoma, in said district.

Attest my official signature and the seal of the said Circuit Court, at the city of Tacoma, the tenth day of October, 1904.

[Seal] A. REEVES AYRES,
Clerk.
By Saml. D. Bridges,
Deputy Clerk.

Clerk's fees on transcript paid by plaintiff in error, $99.95.

A. REEVES AYRES,
Clerk.
By Saml. D. Bridges,
Deputy Clerk.

Writ of Error (Original).

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States, Ninth Circuit, District of Washington, Western Division, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said Circuit Court, before you, or some of you, between Priscilla Dobler, plaintiff, and Mutual Reserve Life Insurance Company, of New York, defendant, a manifest error hath happened to the great damage of the said Mutual Reserve Life Insurance Company, of New York, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full

and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city of San Francisco, State of California, together with this writ, so that you have the same at the said place within thirty days from the date of this writ in the said court to be then and there held, that the record and proceedings aforesaid be inspected and the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 27th day of August, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-ninth.

[Seal] A. REEVES AYRES,
Clerk of the United States Circuit Court, District of Washington.

[Endorsed]: No. 970. In the Circuit Court of the United States, District of Washington, Western Division. Priscilla Dobler, Plaintiff, vs. Mutual Reserve Life Insurance Company, Defendant. Writ of Error. Filed August 27th, 1904. A. Reeves Ayres, Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

To Priscilla Dobler, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, Ninth Circuit, District of Washington, Western Division, wherein the Mutual Reserve Life Insurance Company, of New York, a corporation, is plaintiff in error, and defendant in said action, and you, Priscilla Dobler, are defendant in error, and plaintiff in said action, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated this 27th day of August, A. D. 1904.

C. H. HANFORD,

United States District Judge, Presiding in said Circuit Court.

Due service of the above citation is hereby acknowledged, at Tacoma, Pierce county, Washington, this 2d day of Sept., 1904.

S. WARBURTON,

J. H. McDANIELS,

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[Endorsed]: No. 970. In the Circuit Court of the United States, District of Washington, Western Division. Priscilla Dobler, Plaintiff, vs. Mutual Reserve Life Insurance Company, Defendant. Citation. Filed U. S. Circuit Court, District of Washington. Aug. 27, 1904. A. Reeves Ayres, Clerk. Saml. D. Bridges, Deputy.

[Endorsed]: No. 1126. United States Circuit Court of Appeals for the Ninth Circuit. Mutual Reserve Life Insurance Company of New York (a Corporation), Plaintiff in Error, vs. Priscilla Dobler, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Washington, Western Division.

Filed October 14, 1904.

F. D. MONCKTON,

Clerk.

1126

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,
Plaintiff in Error,
vs.
PRISCILLA DOBLER,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON, WESTERN DIVISION.

Brief of Plaintiff in Error.

GALUSHA PARSONS,
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ALLEN & LAMBORN PRINTING CO., over P. O., Tacoma.

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STATEMENT.

Defendant in error, Priscilla Dobler, sued upon a policy of assurance in the sum of ten thousand dollars, issued by plaintiff in error upon the life of Frederick C. Dobler, son of said Priscilla Dobler. There was a jury trial, verdict and judgment for plaintiff, and defendant brings error.

On the 20th day of October, 1902, said Frederick C. Dobler, made application in writing to the Mutual Reserve Life Insurance Company for a policy of assurance in the sum of $10,000. (Plaintiff's Exhibit B, Record, page 163.)

The application was taken by one William Hyde Stalker, a soliciting agent of the company. It contained, among others, the following provisions:

"Under no circumstances shall the assurance hereby applied for be in force or the company incur any liability hereunder until the actual payment in cash of the first premium, while I am in good health, in exchange for a receipt on the company's authorized form, signed by its treasurer, and then only in accordance with the terms of said receipt and after the application shall have been received by the company at its home office and a policy actually issued hereon."

On the 7th day of November, 1902, upon receipt of said written application and in accordance with the terms and conditions thereof, the company made out its certain policy of assurance, No. 1,004,047, and forwarded same to the agent, W. H. Stalker.

Said policy of assurance (Record, p. 152) contained, among others the following provisions:

"This policy of assurance witnesseth that in consideration of the application therefor, hereby made a part of this contract, and of three hundred and eighty-one dollars and eighty cents to be actually paid in cash as a first premium on or before the delivery hereof * * *"

"This policy shall not take effect until it is delivered to the assured in person, during his lifetime and while in good health, and the first payment made in cash, except where a binding receipt, signed by the treasurer of the company, is issued prior to such delivery, and then only in accordance with the terms of such receipt."

The policy provided that premiums might be paid one-third by annual premium note and balance in cash. It is conceded that no binding receipt, such as referred to in the policy, was ever issued.

Notwithstanding these provisions of the contract, the agent Stalker did deliver the policy to the assured without any part of the first premium being paid in cash, but taking two promissory notes therefor; one for one-third of the first premium, which he forwarded to the company, and one for the sum of $254.54 payable to and endorsed by the assured and left by said Stalker with the First National Bank of Baker City, Oregon, as collateral to a note made by himself. (Record, p. 67-8.)

No report of his action in this regard was ever made by said Stalker to the company or in any way made known to or ratified by the company. (Record, p. 105-106-111.)

The policy in express terms provided that no agent had authority to waive or modify any of its terms.

It appears that the note for $254.54 was paid by the assured to the bank, the final payment being made February 16, 1903. (Record, p. 88.)

The assured was killed in a snow slide March 3, 1903.

The following day the agent Stalker delivered to Mark T. Kady, the general agent of the company at Portland, a draft for $200 and certain promissory notes, on account of the net premiums on twelve policies, including the policy in suit. (Record, p. 181.)

Thereafter the agent Kady forwarded the $200 draft to the company at its home office in the city of New York, but without any statement as to what it was for or how it should be applied. (Record, p. 111.)

The policy was never credited with any payments upon the books of the company or in any way considered or recognized as in force by the company.

The company had no knowledge or notice that the agent Stalker had taken a note from said F. C. Dobler, on account of the first premium on this policy until about two weeks prior to his death, (Record, p. 111) when it received information tending to show that said Stalker might have taken notes on account of first premiums on certain policies solicited by him. It commenced an investigation to ascertain the facts in this regard but received no definite information until some time after Mr. Dobler's death.

The first defense to this action, therefore, was, that the policy had never taken effect nor become a binding contract for the reason that the same had not been delivered to the assured during his lifetime, while in good health, nor the first premium paid in cash according to the express terms of said policy and written application.

The written application made by said Frederick C. Dobler as aforesaid, further provided:

"I hereby agree that the answers and statements contained in parts I and II of this application, by whomsoever written, are warranted to be full, complete, material and true, and that this agreement, together with this application, are hereby made a part of any policy that may be issued hereon; that if any of the answers or statements made are not full, complete and true, or if any condition or agreement shall not be fulfilled as required herein or by such policy, then the policy issued hereon shall be null and void, and all money paid thereon shall be forfeited to the company; that the person soliciting or taking this application, and also the medical examiner, shall be the agents of the applicant as to all statements and answers in this application, and no statement or answers made or received by any person, or to the company, shall be binding on the company, unless such statements or answers be reduced to writing and contained in this application; that the principles and methods employed by the company in any distribution of surplus, apportionment of profits or costs belonging to any policy that may be issued hereunder are accepted and ratified by and for every

person who shall have or claim any interest in the contract. And I hereby expressly waive all provisions of law now existing or that may hereafter exist, preventing any physician from disclosing any information acquired in a professional capacity or otherwise, or rendering him incompetent as a witness in any way whatever, and for myself and for any other person accepting or acquiring any interest in such policy, authorize and request any such physician to testify concerning my health and physical condition. I further agree not to use alcoholic or malt liquors to excess, or habitually use opium, hydrate of chloral, or other narcotics (tobacco excepted); and that under no circumstances shall the assurance hereby applied for be in force or the company incur any liability hereunder until the actual payment in cash of the first premium, while I am in good health, in exchange for a receipt on the company's authorized form, signed by its treasurer, and then only in accordance with the terms of said receipt and after the application shall have been received and approved by the company at its home office and a policy actually issued hereon.

"And I further expressly warrant that I have read the questions and answers contained in this application in parts I and II hereof, and each and all of them, and that said answers and each and all of them are my answers.

"And I do further expressly warrant that I have not, nor has any one on my behalf, made to the agent or medical examiner, or to any other person, any answers to the questions contained in this application other than or different from the written answers as contained in this application.

"And I do further expressly warrant that I have not, nor has any one on my behalf, given to the agent or medical examiner, or to any other person, any information or stated any facts, in any way contradictory of or inconsistent with the truth of the answers as written in this application in parts I and II hereof, and each and every one of the same, it being distinctly and specifically understood and agreed that the validity of any policy to be issued hereon is and shall be dependent upon the truth or falsity of the written answers contained in this application in parts I and II hereof, to the questions therein propounded."

In and by said written application said Frederick C. Dobler in response to the following questions made the following answers:

Q. Have you now any assurance on your life? If so, where, when taken, for what amounts and what kinds of policies?

A. Name of company or association; date issued; amount. 5,000. Washington Life; combination bond; May, 1900; 5,000.

Q. Have you any other assurance?

A. None.

(Record, p. 164.)

It was claimed by the company that these answers were not full, complete and true, but that in truth and in fact at the time of making said written application said Frederick C. Dobler held and had other assurance, not mentioned or referred to by him, namely, a $5,000 policy in the Travelers Insurance Company and a $1,000 policy in the same company.

It is admitted (Record, p. 100) that at the time of making said written application said Frederick C. Dobler held and had the $5,000 policy in the Travelers Insurance Company, (defendant's exhibit 1, Record, p. 189), and that said policy was in no way mentioned or referred to in the application for the policy here in suit.

It is contended by the company that the failure of said Frederick C. Dobler to make disclosure of all of the assurance held by him at the time of making said written application, was, by the express terms of the contract, a breach of warranty voiding the policy. That this conclusion, as matter of law, necessarily follows from the admitted facts.

To avoid this conclusion the lower court permitted plaintiff to show, by the testimony of the witness Stalker, that he, Stalker, assisted deceased in the preparation of the application, instructed him as to the answers called for by the questions contained in the application and informed him what the correct answers to such questions would be; that deceased told Stalker that he was carrying $5,000 accident insurance in the Travelers Insurance Company, and also $1,000 accident insurance in another company, and that Stalker told deceased that a disclosure of these policies was not called for; (Record, p. 75-76-126); that it was understood between Stalker and deceased that the answers contained in the written application were full, true and complete answers to the respective questions; that there was no disposition upon the part of Mr. Dobler to conceal anything; that he, Stalker, could not see and cannot see why the accident insurance carried by Mr. Dobler would affect the issuing of the policy in question. (Record, p. 127.)

Defendant contends that this evidence was inadmissible for any purpose, either to contradict the written contract or to create an estoppel, and that the action of the lower court in admitting it was error.

In and by said written application said Frederick C. Dobler made the following answers to the following questions:

In part I of the application, Record, p. 165.

Q. When did you last consult a physician and for what reason?

A. Do not remember, years ago.

Q. Give name and address of last physician consulted?

A. (No answer.)

In part II of the application, Record, p. 172.

Q. How long since you last consulted, or were attended by a physician? Give date?

A. Do not remember; long time ago.

Q. State name and address of such physician?

A. (No answer.)

Q. For what disease or ailment?

A. (No answer.)

Q. Give name and address of each and every physician who has prescribed for or attended you within the past five years, and for what disease or ailment and date?

A. (No answer.)

Q. Have you had any illness, disease or medical attendance not stated above?

A. (No answer.)

It is contended by plaintiff in error that these answers were not full, complete and true, but that in truth and in fact said Frederick C. Dobler had, within the five years immediately preceding the date of said application, at frequent intervals consulted a physician, and that his failure to make full disclosure of the facts in that regard was, by the express terms of the contract, a breach of warranty voiding the policy.

The evidence in this regard is embodied in the proofs of death submitted by plaintiff to defendant company (Record, p. 201-202), and in the deposition of Dr. W. T. Phy, a witness for plaintiff. (Record, p. 90 to 95.)

In the proofs of death (Record, p. 202) Dr. Phy swore that he had prescribed for deceased at intervals for five years.

In his deposition, testifying as a witness for plaintiff, Dr. Phy swore that he never consulted or attended deceased for any ailment or disease; that he was an intimate friend of deceased and in conversation with him mentioned to him the advisability of persons in general having frequent physical examinations by their physicians as a matter of precaution; that he made several physical examinations of deceased, including examinations of his urine, and at no time found any physical ailment; never prescribed any medicine for him; did on several occasions advise him concerning hygienic measures which any one should follow to preserve their health; never made any charge for these examinations. That within his knowledge said Frederick C.

Dobler was never afflicted with any disease or ailment. That he made physical examinations of said Frederick C. Dobler at frequent intervals during the last five years of his life; examined his heart, lungs and urine; that such examinations were made in his office at Mr. Dobler's request.

The questions which plaintiff in error presents to this court are:

1. Was the parol evidence of the witness Stalker admissible to vary, modify and contradict the written contract, or to create an estoppel?

2. Under the terms and conditions of this particular contract was there a breach of warranty by the assured in failing to make disclosure of the $5,000 policy in the Travelers Insurance Company held by him?

3. Under the terms and conditions of this particular contract was there a breach of warranty by the assured in failing to make disclosure of his consultations with a physician?

ASSIGNMENT OF ERRORS.

1. The court erred in admitting in evidence that portion of the testimony of the witness William H. Stalker, as follows:

Interrogatory 19. Did you assist Frederick C. Dobler in the preparation of said application; if so, how?

A. I did. I instructed him as to the answers called for by the questions contained in the application on information furnished me by him, and informed him that the correct answers to such questions would be, on the information given me.

2. The court erred in admitting in evidence that portion of the testimony of the witness William H. Stalker, as follows:

Interrogatory 22. Referring to question 10 in said application part I, were you aware and informed by Frederick C. Dobler at the time of preparing the application mentioned, that he, the said Frederick C. Dobler, was carrying $5,000 accident insurance in the Travelers Insurance Company of Hartford, Connecticut, state fully?

A. I was. He told me he was carrying $5,000 accident insurance in the Travelers Insurance Company of Hartford, Connecticut, and he also called my attention to a policy for $1,000 accident insurance that he carried in another company (the name of which I do not remember.) I was also aware of the fact that he carried $5,000 in the Washington Life of New York; he took particular pains to explain to me all his business affairs in connection with insurance. I told him that the $5,000 accident insurance likewise the $1,000 accident policy was not called for in answer to question 10 in application of Mutual Reserve Life Insurance Company.

3. The court erred in admitting in evidence that portion of the testimony of the witness William H. Stalker, as follows:

Interrogatory 23. If your answer to the preceding interrogatory discloses that you wrote in the answers in the application part I, state whether or not it was understood between you and the said Frederick C. Dobler that the answers so written in by you were full, true and complete answers to the respective questions according to the information given you by said Frederick Dobler?

A. It was so understood between Mr. Dobler and myself. There was no disposition upon the part of Mr. Dobler to conceal anything, neither was there on my part, because I could not see and cannot see now, why the accident insurance carried by Mr. Dobler would affect the issuing of the policy in question.

4. The court erred in denying defendant's motion, made after the close of the evidence: To direct a verdict for the defendant on the ground that it appears by the undisputed evidence that in the application for the policy in question there were two distinct breaches of warranty: first, as to other insurance held by the applicant at the time the application was made; and second, as to the applicant having consulted a physician .

5. The court erred in giving to the jury the following instruction: The defendant defends on the ground that Frederick C. Dobler committed a breach of warranty in that he did not make full, true and complete answers to the question numbered ten in part one of the application, which question is in these words: "Have you now any assurance on your life? If so, where, when taken, for what amount and what kind of policies?

Have you any other assurance?'' To which Mr. Dobler made this answer: ''$5,000; Washington Life. May, 1900. Amount, $5,000. Combination bond. None.'' Defendant claims that this answer was not full, complete and true, in that Mr. Dobler was carrying at that time a $5,000 accident policy in the Travelers Insurance Company of Hartford, Connecticut, and also another $1,000 policy. Well, it is admitted by plaintiff that Frederick C. Dobler was carrying a $5,000 accident insurance policy, in the Travelers Insurance Company of Hartford, Connecticut, and it is also claimed by defendant that he was carrying an additional $1,000 accident policy, which fact is disputed by the plaintiff here. In determining the question whether or not this answer was full, complete and true within the meaning of this application, you will take into consideration the circumstances surrounding the parties at the time the application was signed; any discussion that then took place between the deceased and the agent of the defendant company as to the meaning of the question asked, ''Have you any assurance on your life,'' and if you find from the evidence that a doubt might reasonably and fairly be entertained as to whether this question called for disclosure of any purely accident insurance that Mr. Dobler then carried, and that Mr. Dobler understood that it did not call for the disclosure of purely accident insurance, but only called for the disclosure of life insurance; and if such was the understanding of the defendant's agent at that time soliciting the insurance and receiving the application, then you may conclude this answer to this question was full, complete and true, and you will consider the evidence no further.

6. The court erred in giving to the jury the following instruction:

The defendant further defends on the ground that Mr. Dobler committed a breach of warranty in that he did not make full, true and complete answers to question thirteen, in part one of the application, and to question fourteen in part two of the application. Question thirteen, in part one, is as follows: "When did you last consult a physician and for what reason?" To which Mr. Dobler answered: "Don't remember, years ago." Question fourteen in part two is as follows: "How long since you consulted, or were attended by a physician? Give date." To which Mr. Dobler answered: "Don't remember, long time ago." You are instructed that these questions called for a disclosure of any and all those instances, if any, in which Mr. Dobler, the deceased, had consulted or been attended by a physician for some disease or ailment that he had, or supposed that he had; and unless the evidence in the case is such as to show that he had consulted or been attended by a physician for some ailment which he had or supposed he had, you are instructed that those answers to those questions are full, true and complete, and you may disregard that evidence.

7. The court erred in refusing to give to the jury the following instruction requested by the defendant:

It is admitted that at the time of the making of the written application in question by said Frederick C. Dobler, said Frederick C. Dobler held the policy of insurance in the Travelers Insurance Company for five thousand dollars, here in evidence. You are instructed that said policy in the Travelers Insurance Company constituted other assurance within the terms and meaning of the written application and policy sued upon.

ARGUMENT.

In considering the questions presented in this case we must keep clearly before us the terms and conditions of the contract. The contract consists of the written application and the policy. In the application the assured made the following answers to the following questions:

Q. Have you any assurance on your life? If so, where, when taken, for what amount, and what kinds of policies?

A. Name of company or association: 5,000; Washington Life. Date issued, May, 1900. Amount, $5,000. Combination bond.

Q. Have you any other assurance?

A. None.

It is admitted that at the time of making this application the assured had and held, in full force and effect, the $5,000 policy of assurance in the Travelers Insurance Company (Defendant's Ex. 1, Record, p. 189) and that the same was in no way mentioned or referred to in said written application.

It is contended by plaintiff in error that the failure of assured to make disclosure of this $5,000 policy so held by him, was, by the express terms of the contract, a breach of warranty voiding the policy.

But, it is contended, while it is true that deceased held this $5,000 policy in the Travelers; while it is true that no mention or disclosure thereof was made in the application; still deceased *told the agent Stalker all about it at the time.* In other words,

the written contract is not the contract from which the rights and liabilities of the parties must be determined, but it is competent to show by parol an entirely different contract.

By the terms of the written contract the assured agreed: that the answers and statements contained in the application were warranted to be full, complete, material and true; that if any of said answers and statements were not full, complete and true the policy should be void; that the person soliciting the application should be the agent of the applicant; that no statement or answers made or received by any person, or to the company, should be binding on the company unless the same were reduced to writing and contained in the application; that he had read the questions and answers contained in the application, and each and all of them, and that they were his answers; that he expressly warranted that he had not, nor had any one in his behalf, made to the agent any answers to the questions contained in the application other than or different from the written answers; that he expressly warranted that he had not given to the agent any information or stated any fact in any way contradictory of or inconsistent with the truth of the answers as written in the application, it being distinctly and specifically understood and agreed that the validity of any policy to be issued thereon should be dependent upon the truth or falsity of said written answers.

In the face of these provisions of the contract the lower court permitted defendant in error to show by the testimony of the witness Stalker, that he, Stalker, was aware and informed by Frederick C. Dobler at the time of making the application, that said Dobler was carrying $5,000 accident insurance in the Travelers; that said Dobler took particular pains to explain all

his business affairs in connection with insurance; that witness told Mr. Dobler that the $5,000 accident insurance was not called for in answer to the questions contained in this application. (Record, p. 75-76.) That it was understood between witness and Mr. Dobler that the answers written in the application were full, true and complete answers to the respective questions according to the information given witness by said Dobler; that there was no disposition upon the part of Mr. Dobler to conceal anything, neither was there on the part of witness; that witness could not see and cannot see now why the accident insurance carried by Mr. Dobler would affect the issuing of the policy in question. (Record, p. 126-127.)

It is admitted that none of these matters were in any way communicated to or made known to the company. (Record, p. 79.)

We submit, that in permitting this testimony to be introduced and to go to the jury the court erred. If it was error, that it was prejudicial error will hardly be questioned.

Bearing in mind always, the terms of the contract, and the fact that these provisions were contained in the *application*, which was the inception and basis of the contract and upon the faith of which the policy was issued by the company; wherein this case must be distinguished from those cases where no limitation of the powers of the agent is brought to the notice of the assured.

Bearing these things in mind: Was parol evidence admissible in direct, flat contradiction of the written contract? Should the parol evidence above referred to have been permitted to go to the jury?

If the provisions of the written contract are to be given any effect it must be conceded that the parol evidence should not have been admitted.

The question of the force, effect and interpretation of these and similar provisions in insurance contracts has been repeatedly before our courts. The decisions have been far from harmonious, but, we take it, two things are now finally determined. They are:

First. It is competent for an insurance company to limit and restrict the powers of its agent as they were limited by the terms of this application.

Second. Where the powers of the agent are limited as they were in this case, and where such limitation is brought to the notice of the assured at the inception of the contract, as it was in this case, parol evidence of what was said between the agent and the applicant is not admissible to vary or contradict the written contract or to create an estoppel.

It is a fundamental rule of law that parol contemporaneous evidence is inadmissible to vary or contradict the terms of a written contract.

It is manifest that the parol evidence so admitted in this case was directly, flatly contradictory of the written contract. By the terms of the written contract the assured agreed that no statements or answers made or received by any person, or to the company, should be binding on the company unless the same were reduced to writing and contained in the application; that he had read the questions and answers contained in the application, and each and all of them, and that they were his answers; that he

expressly warranted that he had not, nor had any one in his behalf, made to the agent any answers to the questions contained in the application other than or different from the written answers; that he expressly warranted that he had not given to the agent any information or stated any fact in any way contradictory of or inconsistent with the truth of the answers as written in the application.

To hold that this parol evidence is admissible is to hold that these terms of the written contract are a nullity.

To attempt to review the great mass of decided cases upon the question of the effect of provisions and agreements in an insurance contract similar to those contained in this contract, would be a formidable task. Fortunately it has been performed by abler hands than ours and the Supreme Court of the United States has, in a manner which leaves no room for discussion, established the principles that are decisive of this branch of this case.

These precise questions were presented in the case of *Northern Assurance Company vs. Grand View Building Association*, 183 U. S., 308. In view of the conflict among the decided cases and in order to finally settle the law the Supreme Court saw fit to have that case brought before it by writ of certiorari.

It was an action upon a fire insurance policy. The defense was other assurance existing at the time the policy issued. The policy provided that it should be void if the insured then had or should thereafter procure other insurance. It was admitted that the insured did have other insurance at the time the policy

in suit was written. The policy also provided that no agent had power to waive any of its terms unless such waiver was written upon or attached to the policy.

The trial court permitted plaintiff to show by parol that the agent of the insurer was informed and had knowledge of the subsisting insurance at and before the delivery of the policy in suit.

The opinion of the court covers fifty-seven pages of the report, embodying an exhaustive discussion of the rules of law applicable and an analysis of the leading cases in point.

It starts (page 318) with the elementary rule that parol evidence is inadmissible to vary or contradict a written instrument, and reviews the English cases holding the rule applicable to insurance contracts.

At page 321 it says:

"Coming to the decisions of our own state courts, we find that, while there is some contrariety of decisions, the decided weight of authority is to the effect that a policy of insurance in writing cannot be changed or altered by parol evidence of what was said prior or at the time the insurance was effected; that a condition contained in the policy cannot be waived by an agent, unless he has express authority so to do, and then only in the mode prescribed in the policy; and mere knowledge by the agent of an existing policy of insurance will not affect the company unless it is affirmatively shown that such knowledge was communicated to the company."

It cites, quotes from and discusses cases upholding these principles from the states of Massachusetts, Vermont, Rhode Is-

land, Michigan, Connecticut, New York, New Jersey and Pennsylvania.

At page 327 the court refers to certain New York cases which seem to depart from these principles, and then proceeds to demonstrate the fallacy thereof.

It cites with approval and quotes at length from the leading case of *Jennings vs. Chenango County Mutual Insurance Co.*, 2 Denio, 75, where the following language is used (page 331):

"To except policies of insurance out of the class of contracts to which they belong, and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence of the contract the parties intended to make, as distinguished from what appears, by the written contract, to be that which they have in fact made, is a violation of principle that will open the door to the grossest frauds. * * * A court of law can do nothing but enforce the contract as the parties have made it. The legal rule that in courts of law the written contract shall be regarded as the sole repository of the intentions of the parties, and that its terms cannot be changed by parol testimony, is of the utmost importance in the trial of jury cases, and can never be departed from without risk of disastrous consequences to the rights of the parties."

At page 332 it quotes at length and with approval from the case of *Dowees vs. Manhattan Insurance Co.*, 35 N. J. L., where the rule and the reason of the rule, that parol evidence is inadmissible, is clearly laid down.

At page 337 it says:

"In Pennsylvania it has always been held that courts of law will not permit the terms of written contracts to be varied or altered by parol evidence of what took place at or before the time the contracts were made, and that policies of insurance are within the protection of the rule.

"Thus, when it was stipulated in the conditions of insurance that a false description of the property insured should avoid the policy, it was held that a misdescription defeated plaintiff's right to recover under it, though the statements were known to be false by the insurer's agent, who prepared the description, and informed the plaintiff that in that respect the description was immaterial.

"In *Com. Mut. Fire Ins. Co. vs. Huntzinger*, 98 Pa., 41, the subject was examined at length and the previous cases considered, and it was held that mere mutual knowledge by the assured and the agent of the falsity of a fact warranted, is entirely inadequate to induce a reformation of the policy, so as to make it conform to the truth; that it is rather evidence of guilty collusion between the agent and the assured, from which the latter can derive no advantage."

At page 340 commences a review of the decisions of the Federal Courts upon these questions. It finds that the Circuit Court of Appeals for the Seventh circuit has held consistently to the rule as heretofore indicated, while the Circuit Court of Appeals for the Eighth circuit, in the case under consideration, has applied the view that a written contract may, in an action at law, be changed by parol evidence.

At page 341 the court says:

"In such divergence of decisions, we have deemed it proper to have the present case brought before us by a writ of certiorari.

"As to the fundamental rule, that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. The rule itself and the reasons on which it is based are adequately stated in the citations already given from the standard works of Starkie and Greenleaf.'

"Policies of fire insurance in writing have always been held by this court to be within the protection of this rule."

Then follows a consideration of the earlier cases in that court.

At page 358 it quotes at length from the case of *New York Life Insurance Co. vs. Fletcher*, 117 U. S., 519, a leading case. It was an action upon a life insurance policy, practically on all fours with the case at bar. It clearly lays down the rules as here contended for, namely, that it is competent for the company to limit the powers of the agent; and where the powers of the agent are limited, where the terms of the application are such as they are in the case at bar, the applicant is bound by his written application and parol evidence of what was said between the applicant and the agent is not admissible.

The terms of the application in the Fletcher case were very like those in this case.

At page 361 the court says:

"What, then, are the principles sustained by the authorities, and applicable to the case in hand?

"They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in cases of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing endorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeitures caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that

occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is the act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

Upon the question of the admissibility of this parol evidence further argument or citation of authorities seems unnecessary. The Supreme Court, in the cases above referred to, has exhausted the subject.

The reason of the rules excluding parol evidence in such cases applies with special force to life insurance contracts. In the nature of things there would be but two persons who could know anything about it—the assured and the agent. The assured being dead, is the formal written contract to be varied or contradicted by the parol testimony of the agent, the only living person who could possibly testify and whose word would be beyond possibility of contradiction? Is the written contract to be disregarded and a new contract created from the parol testimony of this one man? Is his unsupported word to control? He might be mistaken. He might have forgotten. He might not have correctly understood what was said. He might not tell the truth. *Suppose it was the insurance company that was offering this kind of evidence.*

But let us see upon what grounds the lower court based its ruling. In finally passing upon this question it said:

"There is undoubtedly grave apparent conflict in the decided cases as to the true rule covering this question; but, after con-

siderable thought on the matter, I have reached the conclusion that in this particular case what took place between the agent and the assured at the time this application was made may be properly received in evidence. It is part of the *res gestae*. It shows the circumstances under which the application was made and the particular interpretation which was placed by the parties at the time upon this provision found in the application in regard to other insurance. Now, if it were perfectly plain and clear that the answer to that question required the applicant to disclose the fact that he had the accident policy mentioned, then this testimony would not be relevant; but it is not clear. The phrase itself is an ambiguous one. It may call for the disclosure or it may not. It is broad enough; it might be understood by the parties as calling for such disclosure, and, on the other hand, it may be understood by the parties as not calling for such disclosure. Now, the Supreme Court of the United States, in the case of *Continental Insurance Company vs. Chamberlain*, 132 U. S., say that the purport of the word insurance, in the question, has the same party any other insurance on his life, is not so absolutely certain as in an action upon that policy to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was asked. Now, if that is the rule, a presumably reasonable one, to apply to this case, it is broad enough to permit the answer to the question as to what was said by the insurance agent in relation to the answers to be made to that question. Then let us go further, and consider that when the application was made, when it was completed, the matter of receiving it was the act of the agent of the company, and when it was transmitted to the defendant, going as it did with the construction which he and the assured placed upon it, and

when he accepted the money of the assured, the assured supposed he was making a full and complete answer to this question; I think that the company ought to be estopped from insisting upon a literal interpretation of the answer to that question. In other words, that it should be held to give it the same interpretation given it by its own agent at the time. Now, the court in this case (*Cont. I. Co. vs. Chamberlain*, 132 U. S.) say "The purport of the word in the question has the said party any other insurance on his life, is not so absolutely certain as in an action upon that policy as to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was asked. Such proof does not necessarily contradict the written proof. It simply explains it. It brings to the attention of the court and the jury what the parties meant in the use of the particular language which is under consideration. Of course, I may be in error as to this, but that is the conclusion that I have reached, and the ruling will be in accordance with that conclusion, and the defendant may have an exception to the ruling, so that it may be reviewed by a higher court."

The reasoning of the lower court in admitting this parol evidence, therefore, was: That it was competent to *explain* the written contract and to show the interpretation placed upon it *by the parties.*

By the parties necessarily means, by the assured in person and the insurer acting through the agent Stalker.

Which brings us squarely back to our starting point, and presents the question: Was it competent for the company to so limit the powers of the agent that he would have no power to

act for or bind the company in this regard? If it was, and if his powers were so limited: Who were the *parties* to this interpretation of the contract? In what way was the company a party thereto?

It seems to us, if your Honors please, that in its ruling upon this point the lower court overlooked the very essence of the question. It *assumed* that the action of the agent Stalker was the action of the company; that what was said to or by him was binding upon the company; that his "interpretation" of the contract might be shown as the interpretation of the company.

And this in the face of the positive terms of the contract. The contract expressly limited the powers of the soliciting agent; it provided that in the preparation of the application he *should not* represent the company; it provided that no statements or answers made to or received by any person should be binding on the company unless the same were reduced to writing and contained in the application; the applicant expressly warranted that he had read the questions and answers and that the answers were his answers; that he had not nor had anyone in his behalf made to the agent or to any other person any answers other than or different from the written answers; that he had not, nor had anyone in his behalf, given to the agent or to any other person any information or stated any facts in any way contradictory of or inconsistent with the truth of the answers as written.

In the face of these provisions of the contract, in the face of the rule as laid down by the Supreme Court that these provisions are customary, reasonable and binding upon the applicant, the lower court permitted parol evidence to be introduced to show that the written answers were not the answers, that the

applicant had given the agent other and different answers, that he had given the agent other information and stated different facts. This parol evidence was directly contradictory of the written contract, and was received, as, it was said, showing the *interpretation* of the contract at the time *by the parties.*

We repeat: Under the terms of the contract, *in what way was the company a party to this interpretation?*

As the basis of the contract the company required a written application from the applicant. It wanted and required the statement of the *applicant.* It did not want a statement, or an "interpretation" of the contract by an agent. Therefore, the provisions above referred to were inserted in the application.

Can it be that there is no possible way in which an insurance company can protect itself? Can it be that where such company insists upon a written statement from the applicant as the basis of a contract; that where the applicant is expressly notified that the agent has no power to act for the company in the preparation of that written statement; that where a written contract such as the written contract sued on in this case is made; that its express terms can be disregarded, wiped out and nullified?

In support of its ruling upon this point the lower court cited the case of *Continental Insurance Company vs. Chamberlain*, 132 U. S., 304.

We think the court overlooked the obvious and vital distinctions between that case and the case at bar.

In the case at bar it must be conceded that, if the express

terms of the contract are of any effect, the act of the agent in filling in the application was not the act of the company; that for that purpose he was not the agent of the company.

The Chamberlain case was decided under a statute of the state of Iowa, which provides:

"Any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, *anything in the application or policy to the contrary notwithstanding.*"

Under this statute the court held that the act of the agent in filling in the application was the act of the company and that the company was bound by his acts. That, therefore, parol evidence of what was said between the applicant and the agent was admissible to show what kind of insurance the parties had in mind at the time. But the decision was based absolutely upon the fact that the agent was the agent of the company for that purpose, being made so by the *express terms of the statute.*

That is an entirely different case from the case at bar.

We, therefore, submit: That the action of the lower court in admitting the parol evidence objected to was prejudicial error necessitating a reversal of the judgment.

In view of the exhausive discussion of this question by the Supreme Court of the United States in the cases hereinbefore referred to further argument seems unpardonable; but see:

Dimick vs. Metropolitan Life Ins. Co., 55 Atl., 291.

Hubbard vs. Mutual Reserve Fund Life Assn., 80 Federal, 681-4.

Maier vs. Fidelity Mut. Life Assn., 78 Federal, 566.

The opinion in this case clearly points out the distinction heretofore made between the case at bar and the case of *Continental Insurance Co. vs. Chamberlain*, 132 U. S., 304, cited by the lower court to sustain its ruling.

Liverpool & L. & G. Ins. Co. vs. Richardson Lumber Co., 69 Pac., 938.

Sun Fire Office vs. Wich, 39 Pacific, 587.

The court erred in denying defendant's motion, made after the close of the evidence; to direct a verdict for the defendant on the ground that it appears by the undisputed evidence that in the application for the policy in question there were two distinct breaches of warranty; first, as to other assurance held by the applicant at the time the application was made; and, second, as to the applicant having consulted a physician. (Record, pp. 127-128.)

Under the rules of law established by the Supreme Court of the United States in the cases hereinbefore referred to, it is manifest that parol evidence was inadmissible to vary or contradict the written contract or to create an estoppel; therefore, the rights of the parties must be determined from the written contract. It is equally manifest that the construction of that contract was a question of law for the court.

In the application the assured made the following answers to the following questions:

Q. Have you any assurance on your life? If so, where, when taken, for what amount, and what kinds of policies?

A. Name of company or association: 5,000; Washington Life. Date issued, May, 1900. Amount, $5,000. Combination bond.

Q. Have you any other assurance?

A. None.

We would call particular attention to the form of these questions. He was first asked: "Have you any assurance on your life?" To which question he made the answer above quoted. He was then asked: "*Have you any other assurance?*" To which he answered: "*None.*"

It is admitted that at that time he had in full force and effect the $5,000 policy in the Travelers Insurance Company. (Defendant's Ex. 1, Record, p. 189.)

In and by said written application the assured made the following answers to the following questions:

Q. When did you last consult a physician, and for what reason?

A. Do not remember, years ago.

Q. Give name and address of last physician consulted.

A. (No answer.)

Q. How long since you last consulted, or were attended by a physician, give date?

A. Don't remember; long time ago.

Q. State address and name of such physician?

A. (No answer.)

Q. For what disease or ailment?

A. (No answer.)

Q. Give name and address of each and every physician who has prescribed for or attended you within the past five years, and for what disease or ailment and date.

A. (No answer.)

Q. Have you had any illness, disease or medical attendance not stated above?

A. (No answer.)

The only evidence in relation to assured having consulted a physician is contained in the proofs of death and in the deposition of Dr. Phy.

Dr. Phy made the "Attending Physician" affidavit in the proofs of death. In answer to the following question therein he made the following answer:

Q. When did you first attend or practice for deceased, and for what?

A. Prescribed at intervals for five years.

His deposition is in the record, pages 90 to 95.

By the terms of the application the applicant agreed: that the answers and statements contained in the application were warranted to be full, complete, material and true; that if any of the answers or statements made were not full, complete and true, then the policy issued thereon should be null and void and

all moneys paid thereon forfeited to the company; it being distinctly and specifically understood and agreed that the validity of any policy issued thereon should be dependent upon the truth or falsity of the written answers contained in the application.

Under this contract and in view of the admitted facts and undisputed evidence, we submit, that the lower court erred in denying defendant's motion for a directed verdict.

We presume it will be conceded that the parties to a contract may, by their contract, make any fact material which otherwise might not be deemed material.

It will, we take it, also be conceded, that it is a well settled rule of law that warranties in such a contract must be literally true.

The question, therefore, is: Does it appear from the admitted facts or the undisputed evidence that any of the warranties contained in this application were not literally true?

It is too apparent to admit of argument that the warranties in relation to other assurance were not literally true.

But, it will be argued, this policy in the Travelers was accident insurance, and the question did not call for a disclosure of accident insurance.

This simply brings us back to the *terms of the contract.* The applicant was asked: "Have you any assurance on your life?" If it had stopped there there might be room for the contention that a disclosure of the policy in the Travelers was not called for. But it did not stop there. He was then asked:

"*Have you any other assurance?*" To which he answered: "*None.*"

What did this question mean? It certainly meant something. It cannot be disregarded nor ignored. It was a material part of the contract. It was made material by the express terms of the contract. The applicant expressly warranted that his answer was full, complete and true. He expressly warranted that he had no other assurance. It is now admitted that he did have other assurance. It is admitted that he had a policy of assurance for $5,000 in the Travelers Insurance Company, which matured upon his death and under which the beneficiary, Priscilla Dobler, was paid the full sum of $5,000.

Under these admitted facts there was presented the question of law: Was the answer to this question full, complete and true; was it literally true? If it was not plaintiff could not recover in any event and the court should have directed a verdict for the defendant.

The case of *Northern Assurance Co. vs. Grand View Building Association*, 183 U. S., 308, heretofore referred to, is, it seems to us, decisive of this question. In that case the court began its opinion by saying (page 317):

"Over insurance by concurrent policies on the same property tends to cause carelessness and fraud, and hence a clause in the policies rendering them void in case other insurance had been or should be made upon the property and not consented to in writing by the company, is customary and reasonable.

"In the present case, such a provision was expressly and in unambiguous terms contained in the policy sued on, and it was

shown in the proofs of loss furnished by the insured, and it was found by the jury, that there was a policy in another company outstanding when the present one was issued.

"It is also made to appear that no consent to such other insurance was ever endorsed on the policy or added thereto.

"*Accordingly it is a necessary conclusion that by reason of the breach of the condition the policy became void and of no effect, and no recovery could be had thereon by the assured unless the company waived the condition. The question before us is reduced to one of waiver.*"

It then proceeds to demonstrate that such waiver could not be established by parol evidence of what was said between the agent and the insured at the time the policy was written.

In the case at bar the existence of the other assurance is admitted. There was, therefore, no question for the jury in that regard.

In view of the great divergence of decisions in these insurance company cases the Supreme Court saw fit to have that case brought before it for the purpose of *settling the law*. It sought to lay down certain rules for guidance in the future. It sought by a final and authoritative decision, after a careful and exhaustive consideration, to conclusively establish a precedent.

It did settle the law; it did establish a precedent, which, applied to the admitted facts in this case must be conclusive.

The opinion in that case is quite long, we have already quoted from it at some length under a previous branch of this

argument. At page 361 the court summarizes the principles of law, which are, we think, decisive of this case. We have but to apply them to this case.

The contract was unambiguous. The applicant warranted his answers and statements to be full, complete, material and true; he agreed that if any answers were not full, complete and true the policy should be void, it being distinctly and specifically understood and agreed that the validity of the policy should be dependent upon the truth or falsity of such answers. There was certainly no ambiguity in those provisions of the contract.

He was asked: "Have you any assurance on your life?" His answer made no mention of the policy in the Travelers. He was then asked: "*Have you any other assurance?*" To which he answered: "*None.*" It is equally certain there was no ambiguity here. They were plain, clear, direct questions and positive, unequivocal answers.

It is admitted that he then had the $5,000 policy in the Travelers Insurance Company, which matured upon his death and under which the beneficiary was paid the full sum of $5,000.

The contract speaks for itself; there is no room for construction; the courts can only enforce the contract which the parties have made. They cannot disregard nor ignore any of its terms, nor by construction create for the parties a contract which they did not make.

But the lower court in passing upon the question of the admissibility of parol evidence of what was said between the agent and the applicant, cited the case of *Continental Insurance Co. vs. Chamberlain*, 132 U. S., 304, as an authority to the effect

that these questions were not so absolutely certain and free from ambiguity as to preclude proof as to what the parties meant. We submit that the lower court overlooked the two obvious distinctions between the case cited and the case at bar, which are:

First. The questions were not the same. In the Chamberlain case the question was: "Has the said party any other insurance on his life?" In this case the questions were: "Have you any assurance on your life?" "*Have you any other assurance?*"

If there was any ambiguity in the first of these questions, if there was any doubt as to what was called for, it was certainly removed by the second. Can there be any possible doubt that the second of these questions called for a disclosure of a policy which matured upon the death of the applicant and under which the beneficiary was paid the full sum of $5,000?

Second. The Chamberlain case was decided under a statute of the state of Iowa, which provides: "Any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding."

Under this statute the court held that the agent was the agent of the company; that if at the inception of the contract, the parties thereto, the company represented by its agent and the assured in person, *agreed* that the question in that application did not call for a disclosure of the particular policies in question, the company would be estopped to thereafter say that it

did call for such disclosure; and that where the parties had so agreed that agreement was not necessarily so inconsistent with the terms of that particular contract as to preclude proof of what particular kind of assurance the parties had in mind at the time the question was answered.

That case rests entirely upon the fact that under the statute of the state of Iowa the agent is the agent of the company, anything in the contract to the contrary notwithstanding. It is a very different case from the case at bar.

The case at bar presents simply the question of the construction of this particular contract and whether the admitted facts show a breach of warranty.

The question reduced to its ultimate form seems simplicity itself. We have, the written contract, by which the statements and answers therein contained are agreed to be material and are expressly warranted to be full, complete and true, we have the questions: Have you any assurance on your life? Have you any other assurance? We have the answers thereto.

Query: Were these answers full, complete and true; were they literally true?

In the case of *Aetna Life Insurance Co. vs. David France*, 91 U. S., 510, the syllabus is as follows:

"1. Where an insurance policy contained the clause; that if the proposals, answers and declarations made by the insured should be in any respect false or fraudulent, then the policy should be void, and that any untrue or fraudulent answers should

render it void, all the statements contained in the proposal must be true or the policy will be void.

"2. The materiality of such statements is removed from the consideration of a court or jury, by the agreement of the parties that such statements are absolutely true; and if untrue in any respect the policy shall be void."

In the opinion the court quoted with approval from the case of *Jeffries vs. Insurance Company*, 22 Wallace, 47, as follows:

"Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company."

The opinion then proceeds:

"This decision is so recent and so precise in its application, that it is not necessary to go back of it. It is only necessary to reiterate that all the statements contained in the proposal must be true; that the materiality of such statements is removed from the consideration of a court or jury by the agreement of the parties that such statements are absolutely true, and that, if untrue in any respect, the policy shall be void."

That case was remanded for a new trial as there was a question of fact as to the truth or falsity of the statements. In the case at bar the facts in this regard are admitted, so there is no question for the jury.

The case of *Imperial Fire Insurance Co. vs. County of Coos*, 151 U. S., 452, is squarely in point. The policy was one of fire

insurance. Among other things it provided that it should be void if mechanics were employed in building, altering or repairing the premises. At page 462 the court said:

"It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provisions of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their functions and duty consist simply in carrying out the one actually made."

In the trial court the defendant moved for a directed verdict. At page 466 of the opinion the court said:

"This motion was denied by the court and the defendant excepted. Under the construction we have placed upon the last condition above quoted, we are of opinion that the defendant was entitled, on the conceded facts to have a verdict directed in its favor on the ground that the employment of mechanics to make such material alterations and repairs as were made, without the knowledge or consent of the plaintiff in error, was in and of itself such a violation of the terms of the policy as rendered it void, without reference to the question whether such alterations and repairs had increased the risk or not."

The case of *Dimick vs. Metropolitan Life Insurance Co.*, 55 Atl., 291, is directly in point and on all fours with the case at bar. The precise questions here presented were presented in that case. The defense was, other assurance. The terms of the contract were practically the same as in this case. In the application the

applicant was asked: "Is there any other insurance in force on your life?" To which he answered: "None." It was shown that he held a paid up policy for $219 in another company. The soliciting agent testified that at the time he prepared the application he was advised as to this paid up policy but did not consider it necessary to refer to it.

The court held, that this paid up policy was other insurance in force on his life; that the failure of assured to disclose same in answer to the question contained in the application was a breach of warranty voiding the policy; that the terms of the contract constituted a plain limitation of the powers of the agent and the fact that the applicant was mislead by the advice, ignorance or stupidity of this agent could not affect the contract which he made. The court reviews a great number of the earlier cases and is forced to the conclusion that the answer was not true, and, therefore, by the terms of the contract plaintiff could not recover.

In the case of *Delaware Insurance Co. vs. Greer*, 120 Federal, 916, the Circuit Court of Appeals for the Eighth circuit, said:

"Contracts of insurance, however, are not made by or for casuists or sophists, and the obvious meaning of their plain terms is not to be discarded for some curious, hidden sense, which nothing but the exigency of a hard case and the ingenuity of an acute mind would discover. Contracts of insurance, like other contracts, are to be construed acording to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken in their plain, ordinary and popular sense."

And in conclusion:

"The judgment below is accordingly reversed, and, as this case is here upon an agreed statement of facts the case is remanded to the Circuit Court with directions to enter a judgment upon the merits in favor of the insurance company, with costs."

In the case of *American Credit Indemnity Company vs. Carrollton Furniture Co.*, 95 Federal, 111, the Court of Appeals for the Second circuit used this language:

"But when there is a distinct agreement that the application is a part of the contract, and the statements in the application upon which the contract is based are expressly declared to be warranties, the intent of the assured to bind himself to exactness of truth in his answers, although the facts which are called for may seen not material, is clearly and adequately manifested, and the contract must be enforced according to its terms. Where the assertions or representations upon which the contract is declared to be based are warranties, they must be strictly true, or the policy will not take effect; and this is so whether the thing warranted be material to the risk or not. It would, perhaps, be more proper to say that the parties have agreed on the materiality of the thing warranted, and that the agreement precludes all inquiry into the subject."

In the case of *Kansas Mutual Life Ins. Co. vs. Pinson*, 63 S. W., 531, a misstatement of the ages of assured's sisters was held to be a breach of warranty forfeiting the contract.

In the case of *Metropolitan Insurance Co. vs. Rutherford*, 35 S. E., 361, it appeared that in his application the assured stated that his father died of cholera morbus; in the proofs of

death the beneficiary stated that assured's father died of fistula. The court said:

"Where the answers to questions propounded in an application for insurance are made warranties by the terms of the contract of insurance, its validity depends upon the literal truth of such answers, and it is a matter of no consequence whether they are material to the risk or not. Being warranties, they are in the nature of conditions precedent, and, like them, must be strictly complied with. The warranty being untrue the plaintiff cannot recover."

In the case of *Kiesey & Co. vs. Sun Fire Office*, 88 Federal, 243, the court, at page 246, said:

"In reaching this conclusion, we have not overlooked the customary appeal of counsel in insurance cases to the rule that, where the terms of a policy are ambiguous or of doubtful meaning, its words should be construed most strongly against the company. But it is equally well settled that, contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and, if they are clear and unambiguous their terms are to be taken in their plain, ordinary and proper sense."

In the case of *Webb vs. Security Mutual Life Ins. Co.*, 126 Federal, 635, in the Circuit Court of Appeals for the Eighth Circuit, the applicant had been asked whether any application to insure his life had been made on which a policy had not issued. He answered in the negative. It appeared that previously he had signed two parts of an application to another company, and had been partially examined by a medical examiner, but that he had

declined to complete the examination on the ground that he had been misinformed as to the character of the policy. In discussing the question the court said:

"An applicant for a policy has no right to fence with the truth in answering such an inquiry. He should meet it in good faith and according to its letter and spirit."

It was held that his failure to disclose the facts was a fatal breach of warranty voiding the policy.

See also:

New York Life Ins. Co. vs. Fletcher, 117 U. S., 519.

Maier vs. Fidelity Mut. Life Ass'n., 78 Federal, 566.

United States Life Ins. Co. vs. Smith, 92 Federal, 503-506.

Security Mutual Life Ins. Co. vs. Webb, 106 Fed., 808.

Liverpool & L. & G. Ins. Co. vs. Richardson Lumber Co., 69 Pac., 938.

Home Life Ins. Co. vs. Myers, 112 Fed., 846.

McClain vs. Provident Svs. & L. Soc., 105 Fed., 834.

Provident Svs. L. A. Soc. vs. Llewellyn, 58 Fed., 940.

Schultz vs. Mutual Life Ins. Co., 6 Fed., 672.

Leonard vs. State Mut. Life Ins. Co., 51 Atl., 1049.

Farrell vs. Security Mut. Life Ins. Co., 125 Fed., 684.

Jeffries vs. Economical Mut. Life Ins. Co., 22 Wallace, 47.

Fell vs. John Hancock Mut Life Ins. Co., 57 Atl., 175.

The rights of the parties to this action must be determined from the contract upon which plaintiff is seeking to recover. That contract must receive a fair, reasonable interpretation. Its express terms cannot be ignored nor can they be nullified by construction.

The applicant was asked: "Have you any assurance on your life?" If it had stopped there there might, under the rule that these contracts will be construed most strictly against the company, be room for the contention that a disclosure of the policy in the Travelers Insurance Company was not called for; that the answer was full, complete and true. But it did not stop there. He was then asked: "Have you any other assurance?" To which he answered: "None."

It being admitted that he then had the policy in the Travelers, which matured upon his death and under which the beneficiary was paid the sum of $5,000, is there any avoiding the conclusion that his answer to this question was not full, complete and true.

There remains for consideration the breach of warranty in the answers to the questions as to the applicant having consulted a physician.

In Part I of the application he made the following answers to the following questions: (Record, p. 165.)

Q. When did you last consult a physician and for what reason?

A. Do not remember, years ago.

Q. Give name and address of last physician consulted?

A. (No answer.)

In Part II of the application he made the following answers to the following questions: (Record, p. 172.)

Q. How long since you last consulted, or were attended by a physician? Give date.

A. Do not remember, long time ago.

Q. State name and address of such physician.

A. (No answer.)

Q. For what disease or ailment?

A. (No answer.)

Q. Give name and address of each and every physician who has prescribed for or attended you within the past five years, and for what disease or ailments, and date.

A. (No answer.)

Q. Have you had any illness, disease or medical attendance not stated above?

A. (No answer.)

The only evidence adduced upon the trial in this regard is contained in the proofs of death and in the deposition of Dr. Phy.

In the proofs of death Dr. Phy, who made the attending physician affidavit, stated that he *prescribed* for the deceased at intervals for five years. (Record, p. 202.)

Dr. Phy's deposition was taken as a witness for plaintiff and read at the trial. (Record, p. 90-95.) He testified that he never

attended deceased for any disease and never prescribed any medicine for him, but had on several occasions advised him concerning hygienic measures, and that at frequent intervals during the last five years of his life he made thorough physical examinations of deceased: that he examined his heart, lungs and urine: that such examinations were made in his office at Mr. Dobler's request.

What has been said under the previous branches of this argument is equally applicable here. And it must be borne in mind that the information sought by these questions was of the first importance to the company. At the inception of the contract the company wanted all of the information obtainable as to the health and physical condition of the applicant. It wanted to know whether he was in any way diseased; it wanted to know what physicians had attended him; it wanted to know what physicians he had *consulted;* it wanted to know for what reason he had consulted them; if he had consulted any physician, if any physician was familiar with his health and physical condition, it wanted to know who that physician was.

It appears that during the last five years of his life deceased had at frequent intervals consulted Dr. Phy and that upon each of these occasions Dr. Phy had made a thorough examination as to his physical condition, including examination of his heart, lungs and urine. Knowledge of this fact was of the first importance to the company. Here was a source from which the company could obtain information of great value to it. This source of information was kept from it, concealed from it, by the applicant. He was asked: When did you last *consult* a physician and for what *reason?* It was not when he had been

attended by a physician; it did not imply that such consultation had been with regard to any disease or ailment. It was simply, when did you last *consult* a physician, for what reason, no matter what the reason was, and who was the physician.

Were his answers to these questions full, complete and true? It is manifest that they were not. But, it will be argued, he had not been attended by nor did he consult a physician for any disease or ailment.

It is this particular contract that we are considering, this particular question and this particular answer, in view of the undisputed evidence. This case must be distinguished from those cases where questions are asked which in any way call for an expression of opinion by the applicant or where the form of the questions imply that the consultation was with regard to some disease or ailment. The first of these questions, contained in Part I of the application, certainly did not imply any such thing. He was not asked when he had been attended by a physician, it was: When did you last *consult* a physician, and for what *reason?*

The question called for a certain, definite *fact;* there was no room for the exercise of judgment, no opinion was called for and there was no possibility of misunderstanding. By the terms of the contract it was made material, it was, in fact, of the first importance: it was warranted to be full, complete and true.

In the case of *Cobb vs. Covenant Mutual Benefit Ass'n.*, 26 N. E., 230, the Supreme Court of Massachusetts said:

"While the question whether Cobb had a fixed disease, and what the disease was, might be an inquiry involved in considerable embarrassment, the question whether he had consulted a

physician, or had been professionally treated by one, was simple, and one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries. Indeed, the question which follows is, 'If so, give dates, and for what disease.' It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that Cobb had some distinct disease permanently affecting his general health before it could be said that he answered this question untruthfully. But the scope of the question cannot be thus narrowed. Even if Cobb had only visited a physician from time to time for temporary disturbances, proceeding from accidental causes, the defendant had a right to know this, in order that it might make such further investigation as it deemed necessary. By answering the question in the negative, the applicant induced the defendant to refrain from doing this. In *Insurance Co. vs. McTague*, 49 N. J. Law, 587, 9 Atl. Rep., 766, it was held that where the applicant stated that he had not consulted a physician, or been prescribed for by one, and such statement was shown to have been false by proof of a prescription received, there could be no recovery, although it appeared to have been given for a cold. The court say: 'The representation did not aver a condition of health, or that it was requisite or proper to consult a physician. It avered that he had not consulted a physician, or been prescribed for by a physician. The fact found contradicted this averment whether the consultation and prescription related to a real disease or an apprehended disease.' ''

There are cases which hold that to constitute a breach of warranty in answers to questions somewhat similar to those contained in the application in this case, it must appear that the consulta-

tion with or attendance by a physician was in relation to some disease or ailment which the applicant had or thought he had. But those are all cases where the form of the question implies that the consultation was in relation to some disease or ailment. That is not this case. Here the obvious and only purpose of the questions contained in Part I of the application was to ascertain when he had last *consulted* a physician, for what *reason*, and the name and address of such physician.

We submit, that in this case, under this contract, the answer to this question was not full, complete and true, where it appears by the undisputed evidence that it had been his custom at frequent intervals, for a number of years, to go to Dr. Phy and subject himself to a thorough examination as to his physical condition.

Moreover, we must not lose sight of the fact that in the proofs of death Dr. Phy swore that he had *prescribed* for deceased at frequent intervals for five years, although his statements in this regard were modified when he came to testify as a witness for plaintiff.

It is held in many of the cases that having consulted a physician for some slight ailment, such as a cold, would constitute a breach of warranty. And the cases are practically unanimous in holding that where the consultation was of such a nature or at so recent a period of time that it must fairly be presumed to have been in the mind of the applicant at the time, his failure to disclose same is a fatal breach.

Take the facts of this case. Here was a man who for years had made it his practice, at frequent intervals, to subject himself to a thorough physical examination by his physician. He was

making application for life assurance. He knew that the first thing and most important thing to the company was to ascertain all of the facts possible as to his health and physical condition and to know the name and address of any physician familiar therewith. It was his duty to give all the facts in his possession. By the terms of the application ,which was the basis of the contract, it was distinctly agreed that the policy should be void if he did not make full, complete and true answers to the questions asked him. When asked: "When did you last consult a physician and for what reason?" Answers: "Do not remember, years ago." Question. "Give name and address of last physician consulted?" No answer. And when the question was put in a different form: "How long since you last consulted or were attended by a physician? Give date." Answers: "Do not remember, long time ago."

How much more essential it was that the company should know the *facts*, should know the name and address of the physician who had made these examinations, should be told where it could get information of the first importance, than that it should know that he had at some time been treated for some purely temporary ailment.

If he had been treated for a broken leg, and had failed to disclose such treatment, it would have been a fatal breach. If he had been prescribed for for some temporary ailment and had failed to disclose such prescription, it would have been a fatal breach. If he had consulted a physician for any disease or ailmen which he had or *thought he had,* and failed to disclose such consultation, it would have been a fatal breach. Of how much greater importance to the company was the information which

he should have given in answer to these questions and which he did not give.

All that was necessary was that he should comply with the terms of his contract; should do as he agreed to do; should make full, true and complete answers to the questions asked him. It was so simple, so easy, why did he not do it? He knew that the validity of the policy was dependent upon his doing it, but still he did not do it.

As was said by the Court of Appeals for the Eighth Circuit in the case of *Webb vs. Security Mut. Life Ins. Co.*, 126 Federal, 635:

"An applicant for a policy of insurance has no right to fence with the truth in answering such an inquiry. He should meet it in good faith and according to its letter and spirit."

In the case of *Brady vs. United Life Insurance Ass'n.*, 60 Federal, 727, the court said:

"A true answer to the inquiry as to the name and address of each physician who had attended the applicant within the past five years would have afforded the assurer a valuable source of information in regard to the previous history and physical condition of the applicant. The inquiry called for the statement of a fact within the knowledge of the applicant, and not for one which might be merely a matter of opinion, in respect to which he might be mistaken. The answer was not incomplete or imperfect, but was untrue. * * * Consequently, the trial judge properly withdrew the case from the consideration of the jury and directed a verdict for the defendant."

The question is, simply: Were the answers to these questions full, complete and true? It is so purely a question of the construction of this particular contract, these particular questions and answers, in view of the undisputed evidence, that further citation of authorities seems almost unnecessary. We beg, however, to call attention to the following:

Caruthers vs. Kansas Mut. Life Ins. Co., 108 Fed., 487.

Metropolitan Life Ins. Co. vs. McTague, 9 Atlantic, 766.

Mutual Life Ins. Co. vs. Arkelger, 36 Pacific, 895.

Providence Svs. Life Ass'n. vs. Reutlinger, 25 S. W., 835.

McClain vs. Provident Svs. Life Ass'n., 105 Fed., 834.

Hubbard vs. Mutual Reserve Fund Life Ass'n., 100 Federal, 719.

When one applies to an insurance company for a policy of insurance; when, as in the case at bar, an insurance company is asked to issue a policy for $10,000 in consideration of a cash premium of $254; that insurance company may lawfully require, as the basis of the contract, a written statement from the applicant and a warranty that the matters therein contained are true; that the answers made to any questions therein contained are full, complete and true, that they are literally true.

An insurance company necessarily does business over a large extent of territory, it necessarily works through a large number of soliciting agents who are paid in commissions on the insurance they solicit. Such companies are frequently subject to fraud and imposition. They have found it necessary to pres-

cribe and limit the powers of their soliciting agents; they have found it essential to their self preservation to require as the basis of the contract a written application from the person seeking insurance, and to make it a condition of the contract that such statement be warranted to be full, complete and true; that for a *limited time* the validity of the policy shall be dependent upon the literal truth of the answers and statements contained in such written application.

It must be borne in mind, however, that it is only for a *limited time* that the validity of the policy is so dependent upon the truth or falsity of said written application. The policy in express terms provides: (Record, p. 157.)

"BENEFITS AND PROVISIONS."

"Incontestability.

X. This policy having been in continuous force from its date of issue, after two full annual premiums have been paid hereon, shall thereafter, under the limitations for provision VI., be incontestable, except for fraud, non-payment of premiums as herein provided, or for misstatement of the age of the assured in the application therefor, subject to the provisions hereof."

Some of our courts have been wont to look with disfavor upon these contracts. The exigency of some particular case has made it hard for the men sitting on the bench to enforce the contract which the parties have made.

In some of our courts it has seemed that an assurance contract was an unclean thing, a thing without the pale of the law; an anomaly, unique in itself, not to be construed, interpreted and

enforced according to its terms, not to be governed by the established rules of law relating to contracts in general, but subject to a distinct law of its own, a law that looked, not so much to the enforcement of the contract which the parties had made, but to finding some loophole through which one of the parties might escape his contract; some means of constructing a new contract, of creating obligations not created by the written contract.

The great majority of our courts, however, have recognized that it was not the business of the courts to avoid contracts, that it was not the province of the courts to create contracts, that it was not the privilege of the courts to give to one at the expense of the other, but that it was the duty of the courts to enforce the contract which the parties had made.

The Supreme Court of the United States, in view of the divergence of decisions, in these cases, undertook the task of straightening things out, of establishing certain rules and principles of law applicable to this kind of contracts. For that purpose it had brought before it the case of *Northern Assurance Company vs. Grand View Building Association*, hereinbefore referred to.

Under the rules there laid down, and under the rules recognized in the great majority of the latter and best reasoned decisions, we submit:

1. The lower court erred in admitting the parol evidence of the witness Stalker as to what was said between him and the deceased at the time the application was made.

2. The admitted facts establish a fatal breach of warranty in relation to "other assurance" held by the applicant at the time the application was made.

3. The undisputed evidence establishes a fatal breach of warranty in the answers to the questions regarding the applicant having consulted a physician.

4. The lower court erred in denying defendant's motion for a directed verdict.

5. The action of the lower court in admitting the parol evidence of the witness Stalker, of itself, necessitates the reversal of the judgment. But more than that. On the admitted facts and undisputed evidence the court should have directed a verdict for the defendant. The judgment should be reversed with directions to the lower court to enter a judgment for defendant.

GALUSHA PARSONS,

EDWARD L. PARSONS,

Of Counsel for Plaintiff in Error.

No. 1126

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MUTUAL RESERVE LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
Plaintiff in Error,

vs.

PRISCILLA DOBLER, *Defendant in Error.*

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON, WESTERN DIVISION.

Brief of Defendant in Error.

WARBURTON & McDANIELS,
Counsel for Defendant in Error.

SUMNER INDEX PRINT

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STATEMENT.

We think it well to call the court's attention now to the fact that plaintiff in error has abandoned or waived all of its assignments of error relating to the charge made by the court or the refusal of the court to give the instructions requested by it. These assignments of error could not be considered by the court, for the reason that the record discloses that all the exceptions taken by the plaintiff in error to the court's charge, or its refusal to charge as requested, were taken after the jury had retired to consider their verdict. This court, in the case of *Stone v. U. S.*, 64 Fed. Rep. 667, held that it would not consider assignments of error based on a record of this kind.

On the 20th day of October, 1902, Frederick C. Dobler made application in writing to the Mutual Reserve Life Insurance Company of New York for a policy in the sum of $10,000, at Baker City, Oregon. The application

was executed at that place, delivered into the hands of the representative of the company, who forwarded the same to its home office in New York, where it was accepted and a policy of $10,000 issued in pursuance thereof, which was forwarded to the representative of the company at Baker City, Oregon, where it was delivered to the insured upon his payment of the premium to the representative of the company by two notes. One-third of the premium was paid by note drawn up by the company in New York and signed by Mr. Dobler in Baker City, delivered to the agent of the company and forwarded back to the home office of the company in New York. The balance of the premium was paid by note of $254.00, which the agent discounted at the First National Bank in Baker City, Oregon. A part of it was paid the following December and the balance in the following February. (See Record, Dep. of Stalker, p. 66; Exhibits, pp. 176, 178, 181.) In the following March the insured was killed by a snow-slide in Cornucopia, Oregon. Due notice of his death and proofs of death were thereafter delivered to the company. The company, after a long delay and on July 17th, 1903, denied liability on the contract for the reason, among others, that Mr. Dobler had failed to disclose the fact that he was carrying some accident insurance on his life at the time he made the application. It is shown that the company received this informaton some time in June, 1903. The company never tendered back the premium, but claimed in the court below that the policy was void at its inception, nevertheless it retained the premium. Thereafter, in September, 1903, action was begun upon said policy. Thereafter defendant answered and made several affirmative defenses.

First, it denied that the company had ever delivered the policy or that it had been paid its first premium.

Second, That there was a breach of warranty on the part of the insured in that he had not correctly stated his occupation.

Third, That there was a breach of warranty in that Frederick C. Dobler had failed to answer correctly question number 10: "Have you any other insurance on your life?"

Fourth, That Frederick C. Dobler committed a breach of warranty in that he did not answer correctly: "When did you last consult a physician, and for what reason?"

It was shown by defendant in error that said Frederick C. Dobler had paid the premium, as above mentioned, and that the last portion of his premium was paid and the agent of the company forwarded it to the company, including it in a draft payable to the company in the sum of $200.00. (See Stalker's test. and Exhibits, pp. 176, 178, 179, 181.) The company abandoned this defense at the trial and are not now claiming that Mr. Dobler did not pay the first premium.

The record shows that Mr. Dobler was a young man of exemplary habits, held the position of superintendent of a large mine in Oregon, and was in every way a most desirable risk. The defense that he had not correctly stated his occupation was also abandoned at the trial and is not urged here. Defendants are now relying on two alleged breaches of warranty. The first one is that the applicant committed a breach of warranty in failing to men-

tion a $5,000 accident policy he was carrying in the Travelers' Insurance Company of Hartford, Connecticut, in response to the following question, to which he made the following answer:

	Name of Company or Association.	*Date Issued.*	*Amount.*
10. "Have you now any assurance on your life? If so, where, when taken, for what amounts and what kinds of policies? Have you any other assurance?	$5,000. Wash'ington Life Combination Bond.	May, 1900.	$500.
	None.		

It was shown at the trial that Mr. Dobler mentioned the fact that he had the $5,000 accident policy, but that neither he nor the agent considered that it was called for in the question; hence he omitted to state it.

The other defense relied upon is that Mr. Dobler did not, in answer to the question, "When did you last consult a physician, and for what reason?" give the name of Dr. Phy. Dr. Phy's evidence discloses the fact that he never was consulted by Mr. Dobler for any disease or ailment. A mere glance at the record will show that when the company was called upon to pay the policy in question, which in all fairness and honesty it ought to have paid without a murmur, it immediately began to search for technical defense to urge against the payment of a just claim. It seems more than passing strange that a company would defend on the ground that a policy had never been delivered or the first premium paid, when the evidence was overwhelming that it had been delivered, the premium paid and the company had it in its possession prior to the death of the insured.

BRIEF ON MERITS.

I.

THE FIRST ASSIGNMENT OF ERROR IS NOT WELL TAKEN. THE EVIDENCE COMPLAINED OF WAS STRICKEN OUT ON MOTION OF COUNSEL FOR PLAINTIFF IN ERROR.

By an examination of the record, on pages 74 and 75, it will be found that the answer to the question complained of was stricken on motion of counsel for plaintiff in error. The following is the record:

Interrogatory No. 19: "Did you assist F ederick C. Dobler in the preparation of said application? If so, how?"

To which counsel for plaintiff in error objected, on the ground that the written contract between the parties is entirely clear and unambiguous and this was an attempt on the part of witness to interpret the contract, which is a matter within the province of the court. The objection was overruled.

The answer read as follows:

A. "I did." "I instructed him as to the answers called for by the questions contained in the application on information furnished me by him and informed him what the correct answer to such questions would be on the information given me."

Counsel for plaintiff in error then said:

"I move to strike out the answer after that first part: I did. After that part."

The court then said:

"I will grant the motion to strike out the answer."

We think it clear that the court thus excluded the whole answer, or all the testimony complained of. Counsel had objected to the interrogatory No. 19 being answered at all, which was overruled. The question was then read and the counsel for plaintiff in error made the motion to strike out the whole answer with the exception of the words, "I did." The court having heard the answer read, and having both the original objection in mind as well as the motion to strike, said:

"I will grant the motion to strike out the answer."

We think this is the only proper construction to be put upon the language of the court, considering the whole record. That this was the intention of the court was manifest from the sustaining the objection of the counsel for plaintiff in error of interrogatory No. 21. (Record, page 73), as follows:

Interogatory No. 21: "Did you assume to state and write out in correct language and proper form answers to questions in parts 1 and 2, or either of them, upon the information given you by Frederick C. Dobler?"

This testimony was offered to meet the defense that there was a breach of warranty on the part of Frederick C. Dobler in not answering correctly and truthfully questions contained in parts 1 and 2 of the application. If it is claimed by the plaintiff in error that the court did not strike out the whole question, but left standing that part of it included in the words, "I did," even if this court

agrees with this contention of counsel for plaintiff in error, it is not error under any circumstances. The mere fact that the agent of the Insurance company said that he assisted the applicant in preparing the application could not prejudice or injure the defendant in any manner.

II.

THE COURT PROPERLY ADMITTED THE EVIDENCE OF THE INSURANCE AGENT, MR. STALKER, SHOWING THE MEANING GIVEN BY THE PARTIES TO THE WORDS CONTAINED IN QUESTION 10 OF THE APPLICATION, AT THE TIME THE APPLICATION WAS MADE.

There are several reasons why the court did not commit error in admitting the evidence complained of in plaintiff's assignment of error No. 2, as follows:

"Interrogatory 22. Referring to question 10 in said application, part 1, were you aware and informed by Frederick C. Dobler, at the time of preparing the application mentioned, that he, the said Frederick C. Dobler, was carrying $5,000.00 accident policy in the Travelers' Insurance Company of Hartford, Connecticut, state fully?"

"A. I was. He told me he was carrying $5,000 accident insurance in the Travelers' Insurance Company of Hartford, Connecticut, and he also called my attention to a policy for $1,000 accident insurance that he carried in another company (the name of which I do not remember). I was also aware of the fact that he carried $5,000.00 in the Washington Life of New York; he took particular pains to explain to me all his business affairs in connection with insurance. I told him that the $5,000 accident

insurance likewise the $1,000 accident policy was not called for in answer to question 10 in application of Mutual Reserve Life Insurance Company.''

Plaintiff in error insisted in one of its defenses that there was a breach of warranty in that the applicant did not truthfully answer question 10 of the application, as follows:

	Name of Company or Association	*Date Issued.*	*Amount.*
10. "Have you now any assurance on your life? If so, where, when taken, for what amounts and what kinds of policies? Have you any other assurance?	$5,000. Washington Life Combination Bond. None.	May, 1900.	$500.

At the time of the making of the application, applicant Dobler had $5,000 of strictly accident insurance in the Travelers' Insurance Company of Hartford, Connecticut, which, as will be seen, was not mentioned in answer to question 10. It is admitted that the applicant did state correctly and truthfully all the life insurance he was carrying, and that the same was mentioned in answer to the question. We claim that there was no error in the admission of the evidence complained of, for the following reasons:

A

In the first place, we contend that the question did not call for a disclosure of the accident policy; hence no error in the court's admission of the evidence showing why the parties omitted to mention the accident policy. A moment's thought will convince one that in common parlance, as well as in fact, there is a clear and well defined distinction between insurance for life, or life insurance,

and accident insurance. This distinction appears clearly in all legislation on the two subjects. Legislation affecting the one does not ordinarily affect the other. When legislatures intend to enact laws affecting accident insurance, they speak of it distinctly as accident insurance, and when they enact laws in reference to life insurance, they always speak of it as life insurance, or insurance for life. When one speaks of insurance on his life, or the amount of insurance he is carrying, he does not ordinarily include accident insurance, but mentions that kind of insurance as separate and distinct from insurance he is carrying upon his life. The object and purpose of the two kinds of insurance are entirely distinct. The one is payable in case of an accident to the person, under specified circumstances. The amount varies in accordance with the nature of the injury. The only thing in common between them is that if death occurs by accident the accident insurance company pays the specified amount as well as the life insurance company. In everything else they are entirely distinct and separate. Companies insuring against accidents do not inquire, and care not, what may be the age of the party; whether his health is perfect or imperfect; it is immaterial to it what is his expectancy of life; it is immaterial to it whether his family is predisposed to consumption, insanity or any other disease. It issues policies only for specified times, ordinarily not longer than one year. Its rate of insurance does not depend upon the age of the person, or his condition of health. The inquiries made by the accident insurance companies do not in any manner cover the grounds made by those of a life insurance company. The fact that a party is carrying accident

insurance is a matter that is entirely immaterial to a life insurance company. It is common knowledge that life insurance companies do not intend to inquire concerning accident insurance. It is of so common knowledge that we think the courts may properly take judicial notice of the fact. Any inquiry of any insurance agent or any insurance company will disclose the fact that they never seek to obtain from an applicant information whether he is carrying accident insurance or not. Life insurance, on the contrary, insures against the inevitable; it insures ordinarily for life, and the indemnity is payable at the death of the insured, no matter how it may occur, except in cases of self destruction. The inquiries commonly made of the applicant cover an entirely different field from those made by accident insurance companies. It is material to the life insurance company to ascertain the amount of other life insurance that the applicant is carrying; to know whether the applicant has been refused insurance by other insurance companies. It is material to know the condition of the health of the applicant; to know the family history of the applicant; to know whether his family is predisposed to consumption, insanity or other hereditary diseases. The authorities sustain our contention that question 10 did not call for disclosure of accident insurance. If the one includes the other why is one called accident insurance, the other life insurance? This distinction we are urging was before the 5th Circuit Court of Appeals in the case of Fidelity & Casualty Company vs. Dorough, 107 Federal Reporter, 389. The case arose in Texas, where there is a statute to the effect that if a life or health insurance company resisted the payment

of a claim and suit was brought upon it and judgment recovered, the insurance company should pay an attorney's fee to the plaintiff. In this case, the beneficiary brought an action upon a resisted claim by an accident insurance company and claimed that she was entitled to recover attorney's fee; the court held that there was a well defined distinction exsisting between life and health companies and accident insurance companies. The court uses this language:

"It is conceded there is no law in the state of Texas authorizing the damages and attorney's fees awarded in the verdict and judgment in this case, unless it be found in article 3071, Rev. St., Tex., adopted in 1895, as follows:

" 'Art. 3071. In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss.'

"This section was a part of an act originally passed on May 2, 1874, prior to which time there were no statutes in the state of Texas regulating insurance companies. Other sections of the act of 1874, and afterwards incorporated in the Revised Statutes, are as follows:

" 'Art. 3073. It shall be unlawful for any life or health insurance company to take any kind of risks or issue any policies of insurance except those of life or health, nor shall the business of life or health insurance companies in this state be in any wise conducted or transacted by any company which in this, or any other state or country, is engaged or concerned in the business of marine, fire, inland or other insurance.'

" 'Art. 3061. It shall not be lawful for any person to act within this state as agent or otherwise in soliciting or receiving applications for insurance of any kind whatever or in any manner to aid in the transaction of the business of any insurance company incorporated in this state or out of it, without first procuring a certificate of authority from the commissioner of agriculture, insurance statistics and history.'

"In February, 1875, another act was passed regulating the business of fire, marine, and inland insurance companies. See Rev. St. Tex. arts. 3074, 3085. And in April, 1895, an act was passed which, among other things, defined and distinguished life and accident insurance companies as follows:

" 'Art. 3096a. A life insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value to families or representatives of policy holders, conditioned upon the continuance or cessation of human life, or involving an insurance guarantee, contract or pledge, for the payment of endowments or annuities. An accident insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value to families or representatives of policy holders, conditioned upon the injury, displacement or death of persons resulting from traveling or general accident by land or water.'

"Chapter 55 of the laws of 1895 provides as follows:

" 'That there is hereby imposed upon and shall be collected from each and every person or firm acting as general agents of life, fire, marine and accident insurance companies who may transact any business as such in this state, an annual occupation tax of fifty dollars.'

"In *Association vs. Yoakum,* 39 C. C. A. 56, 98 Fed.

251, followed in *Insurance Co. vs. Ross,* 42 C. C. A. 601, 102 Fed. 722, this court held that article 3071, above quoted, being in force at the time the contract of life insurance was made, became as much a part and parcel of the contract as if it had been expressly incorporated in the policy, and that as against life insurance companies doing business in the state of Texas after article 3071 became a law, and issuing policies thereunder, said article was not in violation of the Constitution of the United States. The question presented here, however, is not necessarily one of constitutionality of the said article in respect to the Constitution of the United States, but, rather, of its applicability to accident insurance companies. The contention was made below, and evidently allowed by the circuit court, and is renewed here, that an accident insurance company is a life or health insurance company, and therefore the statute applies. We have quoted the sections of the statute of Texas bearing upon insurance companies, and we think it plainly appears therefrom that accident insurance, in the legislative mind, was distinct from life and health insurance. The definitions of a life insurance company and of an accident insurance company, as given in the statutes above quoted, show this distinction: One is conditioned upon injuries resulting from traveling, or general accident by land or water. Outside of this defining statute quoted, it is common knowledge that the one insures against the inevitable, with the intent that eventually the amount of the policy shall be paid to the beneficiary; the other insures against the accidental, with the intent that the liability of the insurance company to pay the amount or amounts stipulated shall attach only on the occurrence of bodily injuries to the insured, sustained through external, violent, and accidental causes. The distinction between accident insurance and health insurance is equally clear. Accidental injury may happen; sickness and infirm health may be considered as inevitable.

In the one the amount of indemnity stipulated may never become due; in the other, if the policy is kept in force the indemnity stipulated is certain to become due.''

Fidelity & Casualty Co. vs. Dorough, 107 Fed. 389.

To the same effect is *Tickten vs. Fidelity & Casualty Company of New York,* 87 Federal Reporter, 543. The question in this case arose on the construction of a Missouri statute to the effect that in suits upon policies of insurance on life the company cannot defend on the ground of suicide, unless the applicant intended to commit suicide at the time of making the application. In this case the accident insurance company resisted the claim on the ground that the defendant had committed suicide. The beneficiary claimed that under the statute of Missouri this defense was not open to it. The court held that the words, ''insurance on life,'' did not include accident insurance.

'' 'Sec. 5855. In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void.' ''

''The question of controlling importance to be decided is: Does this statute apply to an accident policy? The time at my command will not permit more than to briefly state the conclusions I have reached on this question. By the express terms of said section it is limited to 'policies of insurance on life.' Clearly, therefore, there

is no escape from the proposition that, unless an accident policy can be held to be a policy of insurance on life, this statute affords no shelter to the defendant. It being a statute in contravention of the common-law rule, affirmative legislation changing the rule at common law is indispensable. From the very inception of any legislation in this state respecting the subject of policies on life insurance, such policies have been distinctively recognized as *sui generis*. Provisions peculiarly and exclusively applicable thereto have, in lines broad and distinctive, run through the different statutes. When accident insurance policies were provided for in acts of the legislature, provisions and requirements peculiar to them were as distinctively present and observed. This was confessedly so until the statue of 1889, when life insurance companies were for the first time authorized to engage in the business of issuing accident policies. Section 5,811, Rev. St. Mo. 1889, amending section 5938 Rev. St. Mo. 1879. Prior to this amendment, no lawyer ever contended that these two business associations were not erected as separate departments, as distinct as any other two business concerns erected under the statutes of the state providing for the creation of business corporations. And, as up to the enactment of the last named statute, no life insurance company created under the laws of the state of Missouri, or doing business therein, was permitted to enter into the business of issuing accident insurance policies n the state, when the legislature declared that, in suits upon policies of insurance for life, it should be no defense that the injured had died by suicide, the rule '*Expressio unius est exclusio alterius*, precluded carrying this special enactment over to any other claim of insurance than that of insurance on life proper.''

Ticktin vs. Fidelity & Casualty Company of New York, 87 Fed. 543.

Suppose a party should borrow money from a bank, upon his statement that he had $10,000 life insurance, which he agreed to assign to the bank as security for the money he was borrowing, and later should bring to the bank a $10,000 accident policy; would anyone contend for a moment that his original statement was correct, or that he had fulfilled the letter of his agreement? Certainly the accident insurance in such a case would not be what the parties would understand was meant when they entered into such an agreement.

Suppose two persons affected a co-partnership on the agreement that each should carry $5,000 "life insurance" to meet any liabilities of the co-partnership in case of the death of either partner, and one of the partners should take out a $5,000 accident policy, would it not be a violation of the spirit and letter of the agreement? Would not the other co-partner have a right to complain? Examples of this kind might be multiplied indefinitely, all of which would show clearly that in ordinary parlance the words "accident insurance" and "life insurance" are constantly considered as two distinct forms of insurance. If life insurance and accident insurance mean one and the same thing, what is the use of the two words,—accident insurance to designate one form of insurance and life insurance another form? The case of *Penn Mutual Life Insurance Company vs. Mechanics' Savings Bank & Trust Company,* 72 Federal Reporter 413, is in point. In fact, the court goes much further in this and subsequent cases which we will cite than is necessary to sustain our contention in this case. The applicant in this case was asked: "Have you your life insured in this or any other company?

If so, give the name of each company and amount of each policy.'' The applicant answered stating all of the regular life insurance he was carrying in different companies, but omitted to mention the fact that he was carrying a policy of insurance in the Knights of Pythias and Royal Arcanum Mutual Aid Associations. The policies in this case were on the life of the applicant, payable at his death, and the contract in such cases is very similar to that of a strictly life insurance company. The information solicited in each case is largely the same. The age of the insured in each case determines the amount of the premium; the employment and health of an applicant are inquired into particularly in each case. The predisposition of the insured or his family to such diseases as consumption, insanity, etc., is material in each case and is inquired about. Yet, there is a broad distinction recognized commonly among insurance companies and individuals between the two kinds of life insurance. The weight of authority is to the effect that unless life insurance in mutual aid and franternal societies is specifically inqured about it is not included in the question. This being true, it would seem that there could be no serious question in the mind of the court that accident insurance, which does not cover the same field, is not included in such a question. Judge Taft, speaking for the court, uses this language:

''The circuit court was right in holding that within the scope of the question, 'Have you your life insured in this or any other company? (If so, give the name of each company and the kind and amount of the policy),' were not included Schardt's certificates of insurance in the Knights of Pythias and Royal Arcanum Mutual Aid Associations. It will be conceded that these associations,

which are primarily for social and charitable purposes, and for securing efficient mutual aid among their members, are not usually described as insurance companies. That the certificate which they issue to a member insuring upon certain conditions the payment of a sum certain to the member's representatives on his death, has much resemblance in form, purpose and effect to an insurance policy, is true; and, if we were called upon to give the application a wide and liberal construction in favor of the insurance company, we might properly hold that the question embraced in its scope every association or individual contracting to pay money to one's representatives in the event of his death. Such a construction might be warranted by the probable purpose of the question to enable the company to judge how great a motive his life insurance would furnish the applicant for self-destruction, or the fraudulent simulation of death. But we are here considering a contract and application drawn with great nicety by the insurance company, and framed with the sole purpose of eliciting from the insured full information of all the circumstances which the company's long experience has led it to believe to be valuable in calculating the risk. We cannot presume the company to have been ignorant of the fact that large numbers of persons have taken out life insurance in mutual benefit associations which are not ordinarily described as insurance companies, and that doubt has often arisen whether the contracts they issue are properly or technically described as life insurance at all. *Insurance Company v. Chamberlain,* 132 U. S. 304, 10 Sup. Ct. 87. Having in view the well-established rule that insurance contracts are to be construed against those who frame them (*Indemnity Co. v. Dorgan,* 16 U. S. App. 290, 309, 7 C. C. A. 581, 58 Fed. 945; *Insurance Co. v. Crandal,* 120 U. S. 527, 533, 7 Sup. Ct. 685), and that any doubt or ambiguity in them is to be resolved in favor of the insured, we conclude that a certificate in a mutual benefit

and social society was not within the description, 'policy of life insurance in any other company.' We are fortified in the conclusion by the fact that this contract is a Pennsylvania contract, and the courts of that state have uniformly held that mutual aid associations and insurance companies are so clearly to be distinguished that statutes applying to insurance companies and their policies do not have application to mutual aid assocations, and the certificates of life insurance which they issue to their members.''

To the same effect is the decision of the United States Supreme Court in the case of *Continental Life Insurance Company vs. Chamberlain,* 132 U. S. 304, 33 Law Ed., 341.

In this case, the application contained this question: ''Has the said party (the applicant) any other insurance on his life; if so, where and for what amount?'' The answer was, ''No other.'' He omitted to mention the fact that he had several certificates of membership with certain co-operative or fraternal insurance companies. The question was whether the failure to mention these certificates rendered the policy void. Speaking of this the court says:

''The purport of the word 'insurance' in the question, 'Has the said party any other insurance on his life?' is not so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. *Such proof does not necessarily contradict the written contract.* Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the statute and of the understanding reached between the assured and the company by its agent when the application was completed, namely, that the particular kind

of insurance inquired about did not include insurance in co-operative societies. In view of the statute and of that understanding, upon the faith of which the assured made his application, paid the first premium and accepted the policy, the company is estopped, by every principle of justice, from saying that its question embraced insurance in co-operative assocations. The answer of 'No other' having been written by its own agent, invested with authority to solicit and procure applications, to deliver policies, and, under certain limitations, to receive premiums, should be held as properly interpreting both the question and the answer as to other insurance."

The same question arose in the case of *Equitable Life Assurance Society vs. Hazlewood,* 12 S. W. 621, and the court disposed of it in the following language:

"The application for insurance contains the following questions and answers: "Is any negotiation for other insurance now pending or contemplated?' to which the insured answered in writing, 'No.' 'Has a policy ever been applied for which was not thereafter issued, or which, if issued, was modified in amount, kind, or rates? If yes, for what company, and when?' to which the insured answered in writing, 'No.' There was conflicting evidence as to whether the insured had not applied for membership in an order known as the 'Legion of Honor.' Plaintiff was permitted to prove, by the agent of the corporation by whom the application was secured, that pending negotiations between him and the insured, and before the insured made answer to said questions, he (the insured) asked him (the agent) 'what was meant by that,—if it referred to assessment companies or mutual companies.' Witness explained that it did not; and the insured then said he had made application to the Legion of Honor for assurance, whereupon witness told him that the Legion of Honor was a mutual company, and was not regarded as a life in-

surance company, and he was instructed by the general agent of defendant not to consider them as assurance companies. We think the evidence was properly admitted in each instance.''

Mr. Bacon, in his work on Life Insurance, Section 235 A, says:

''Whether or not beneficiary societies are embraced in the question as to other insurance is not entirely settled, but it has been held that the act of the agent in stating to the applicant that certificates in beneficiary societies are not regarded as life insurance, is binding upon the company.''

The Fourth Circuit Court of Appeals, in the case of *Fidelity Mutual Life Association vs Miller,* 92 Fed. p. 63, at pages 72 and 73, reviews this question and cites with approval the case of Penn Mutual Life Insurance Company vs. Mechanics'Saving Bank & Trust Company, *supra.* After quoting very freely from the opinion in that case, it says:

''Can it be said from this description that the certificate of membership in this secret order came within the language used in the application for the policy: 'That I have never made application for insurance on my life to any company, association, or society?' 'Give name of each company, date of application, kind of policy, and amount applied for.' This last inquiry, read in connection with the first, shows clearly that it was a policy in some 'company' about which information was sought, and that in the first inquiry the words 'company, association, or society' all referred to one and the same thing, viz. to an insurance company; and, besides, while in their broader sense and acceptation, the words 'company, association, or society' may cover a beneficial order, it will not be main-

tained that in ordinary life insurance parlance they mean any such thing. An 'insurance company,' and 'insurance association,' or 'insurance society,' all mean one and the same thing; that is, regular insurance. Hence, in the second inquiry, the name of each 'company' was alone requested. The plaintiff in error itself is an insurance association, as distinguished from a company, and there are companies and societies in abundance; for instance, 'The Equitable Life Assurance Society,' 'The New York Life Insurance Company,' etc., all meaning the same thing. We do not feel that there can be any serious doubt as to the correctness of this conclusion—particularly when, as we have shown, questions of doubt and ambiguity as to the meaning of the policy should be resolved against the company issuing the same."

The weight of authority is certainly in favor of our contention that question No. 10 did not call for a disclosure of accident insurance. We have not been able to find a case decided by the highest tribunal of any state, wherein it was held that accident insurance is included within the term "life insurance." As shown by Judge Taft in the case heretofore cited, the weight of authority is that even fraternal insurance, or insurance in mutual benefit orders or associations is not included in the inquiry as to what life insurance the applicant is carrying. If this form of insurance, which indemnifies the applicant for the term of his natural life, payable at his death, no matter how it may occur, is not included in the term "life insurance" as ordinarily used in applications, it certainly needs no argument to show that accident insurance is not included in such a question. One thing is sure, that very eminent courts have sustained our view; others have said it was doubtful whether the question called for fraternal insur-

ance or insurance in mutual benefit orders or associations; none have held that accident insurance is included in the term "life insurance." The most that plaintiff in error can claim is that eminent courts disagree as to the meaning of the question. If this be admitted, plaintiff in error must fail under the general rules regulating the construction of insurance contracts. We will state the rules of construction by quotations from eminent authorities. These rules have such abundant authority to support them and are so constantly reiterated that they may be termed maxims of the law.

"We are dealing purely with the question of forfeiture, and the rule is that if policies of insurance contain insconsistent provisons, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract. *Thompson vs. Phenix Ins. So.* 136 U. S. 287, 34 L. Ed. 408, 10 Sup. Ct. Rep. 1019; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. Ed. 536."

McMaster v. N. Y. Life Ins. Co. 183 U. S. p. 25; 46 L. Ed. p. 65.

"If an insurance company intends its policy to mean otherwise it must express that intention more distinctly than was done by the defendant. If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructons, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because those instruments are drawn by the company. *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 678 (24:563:565)."

Thompson v. Phenix Ins. Co. 136 U. S. p. 287, 34 L. Ed. 408.

"In case of doubt it is not only to be construed against them, but it is further subject to the rule of construction that it must be understood in the sense in which the insurers knew that the assured understood or would naturally understand it. In law the term 'premises' in an instrument is often used to refer to whatever precedes: * * * This provision of the Atlantic Company's policy should, I think, be held to refer only to other policies that are upon substantially the same risk, i. e. upon essentially the same subject matter, and upon the same essential terms and conditions of the policy as well. As these 'disbursement' policies are so wholly different from the others as to subject-matter, terms and risks, and do not cover partial loss, I am of the opinion that they should not be deemed within the language or intention of the provision quoted."

International Nav. Co. v. Atlantic Mut. Ins. Co.
100 Fed. Rep. 304.

"This interpretation is the same as that which the agent of the company who issued this policy testified he had acted upon in transacting the business of the company at that place. He was supplied by it with blank policies and these clauses to be used as occasion should require, and when other insurance was intended to be permitted he used the 'three-fourths clause,' which covered the whole subject once for all.

"But, if this conclusion were not so clear as it seems to us to be, and were only a permissible one, there are several established rules of construction applicable to the subject which concur in inducing the same result. One of those rules is that forfeitures are not favored in law, and the court will seek to find, if fairly possible, such a construction of the contracts of parties as will relieve them from the inequitable consequences arising therefrom. *New York*

Indians v. U. S., 170 U. S. 1, 25, 18 Sup Ct. 531; *Tiffany v.Bank,* 18 Wall. 409; *Cotten v. Casualty Co.,* 41 Fed. 506; *Jackson v. Same,* 21 C. C. A. 394, 75 Fed. 359; *May Ins.* (2nd Ed.) 170, 376. Another rule which is especially, but not solely, applicable to insurance contracts is that, when the meaning of the instrument, taken as a whole, is doubtful, its several provisions should be construed favorably to the party to whom the undertaken is made, and most strongly against the party in whose interest the provisions are introduced. *Insurance Co. v. Wright,* 1 Wall. 456, 468; *National Bank v. Insurance Co.,* 95 U. S. 673, 678; *Moulor v. Insurance Co.* 111 U. S.335, 4 Sup. Ct. 466; *Insurance Co. v. McConkey,* 127 U. S. 661, 666, 7 Sup. Ct. 1360."

Palatine Ins. Co. v. Ewing, 92 Fed. 111.

"If it intended that the conditions under consideration should thus apply, why did it not say so? We think that this condition refers to a mill or manufactory in the sense only of a building used for milling or manufacturing, and that it has no application to the personal property covered by the policy.

"Moreover, if there is a reasonable doubt as to the meaning or application of this clause, it should be construed most favorably to the insured, because the insurer prepared and executed the contract, and is responsible for the language used. *Kratzenstein v. Assurance Co.* 116 N. Y. 54, 59, 22 N. E. Rep. 221; *Dilleber v. Insurance Co.,* 69 N. Y. 256, 263. As was said by this court in a recent case: 'The defendant is claiming a forfeiture. When a clause in a contract is capable of two constructions, one of which will support, and the other defeat, the principal obligation, the former will be preferred. Forfeitures are not favored, and the party claiming a forfeiture will not be permitted, upon equivocal or doubtful clauses or words contained in his own contract, to deprive the other party of the benefit

of the right or indemnity for which he contracted.' *Baley v. Insurance Co.,* 80 N. Y. 21, 23."

Halpin v. Ins. Co., 23 N. E. p 989.

"For the purpose of upholding the contract of insurance, its provisions will be strictly construed as against the insurer. *McMaster v. Insurance Co.,* 55 N. Y. 222; *Dillebar v. Insurance Co.,* 69 N. Y. 256. When its terms permit more than one construction, that one will be adopted which supports its validity, (*Coyne v. Weaver,* 84 N. Y. 386); and it is only when no other is permissible by the language used that a construction which works a forfeiture will be given to such an instrument, (*Hitchcock v. Insurance Co.,* 26 N. Y. 69; *Griffey v. Insurance Co.,* 100 N. Y. 417, 3 N. E. Rep. 309). The reason assigned for such rule of construction is that the insurer is supposed to have chosen the language to express the terms of the contract, and it has become a rule of law that, if it be left in doubt whether words of the contract 'were used in an enlarged or restricted sense, other things being equal, the construction will be adopted which is most beneficial to the promisee.' *Hoffman v. Insurance Co.,* 32 N. Y. 405, 413. There is nothing in the language of the policy to indicate that the defendant had reason to suppose that the promisee understood that suicide of the member came within its terms; and words may easily have been employed to embrace it within a condition, if it had been in the contemplation of the defendant as an act of forfeiture of the claim of the beneficiary upon the contract."

Darrow v. Family Fund Society, 22 N. E. 1093.

If the language of an application may be understood in more than one sense, it is to be construed most strongly against the insurer and in favor of the insured.

Bayley vs. Employers' Liability Co., 125 Cal. 345.

The answers in an application should receive a reasonable, not technical, construction, one within the minds of the parties when they prepared the contract.

A. O. U. W., vs. Belcham 145 Ill. 308, 33 N. E. 86.

Question 10 of the application, reading as follows: "Have you now any insurance on your life? If so, where taken, what amount and what kind of policy? Have you any other assurance?" should be read in connection with question 11, which is in part as follows: "Has any proposal or application *to insure your life* or for membership ever been made to any company, association or agent, etc.?" Also in connection with question 12, which reads in part as follows: "Has any proposal or aplication to assure *your life* or for membership in any company or association now pending, etc?" Also in connection with questions 8 and 9 in part 3 of the application. (8) "Compared with the averages of lives of the same age and sex, do you believe the applicant likely to live the full expectancy?" (9) "Everything considered, what is the maximum amount of insurance that in your judgment can safely be issued upon *this life*?" These other questions we think clearly show that all of these inquiries were directed solely to insurance upon life and for the full term of his life, or what is commonly termed life insurance as distinguished from accident insurance.

"In construing or interpreting the meaning of a contract, or the meaning of any term or phrase in the contract,

the whole contract should be examined in reference to its object or purpose, and it is the duty of the court to construe any phrase or term that is not ambiguous standing by itself by other terms or conditions of the contract that modify or qualify the meaning of such unambiguous phrase or term in the contract."

O'Brien v. Miller, 168 U. S. 287 on p. 297; 42 Law. Ed. 472.

McClain v. Ins. Co., 110 Fed. p. 80.

B

There is a strict similarity between the present case and that of the *Continental Insurance Company v. Chamberlain,* 132 U. S. 304. This case is entirely dissimilar to that of the *Northern Assurance Co. v. Building Association,* 183 U. S. 308, relied upon by plaintiff in error.

We have already reviewed to some extent the Chamberlain case. The facts in that case are almost identical with those in this case. In each case the application required the insured to state what other insurance he had upon his life. In the Chamberlain case the applicant omitted to mention some insurance in co-operative insurance companies, which the company insisted was a breach of warranty. In the language of the opinion of the court in that case, "It was admitted at the trial that at the date of Steven's application he had insurance in co-operative companies to the amount of $12,000." This insurance was payable at death. It must be conceded, we claim, that this form of insurance has far more resemblance to, and would be more properly included in the question than accident

insurance. In this case it was admitted at the trial that the applicant had a $5,000.00 accident policy in force at the time that the application for the policy in question was made. In both cases the insured and the agent of the company were of the opinion that the insurance omitted was not called for by the question, hence the omission. In both instances the application was made and the policy delivered in a state where statutes were in force making the soliciting agent the agent of the company. The record in the case at bar discloses the fact that the application was made at Baker City, Oregon, and the policy was delivered there and the premium paid there, making it an Oregon contract and the statute of Oregon a part of it. See record, pp. 163, 178, 179, 180, 181.

In addition to this, the record shows that, pursuant to the laws of Oregon, the plaintiff in error had appointed in writing Mr. Stalker, its agent. The appiontment reads in part as follows:

"That the said party of the second part is *hereby appointed representative of said company for the purpose of procuring applications of assurance therein* in the territory embraced in this agreement, and for the further purpose of appointing suitable sub-agents on terms to be approved by the company, subject to the terms and conditions herein. This appointment is on the following terms and conditions, which are agreed to by each party hereto: The district in which said party of the second part shall have the right to work shall embrace the States of Oregon, Washington, Idaho and Montana, but the said district is not assigned exclusively to the said party of the second part."

There is nothing in the balance of the writing ap-

pointing him as agent that in any manner limits his authority as a "representative of said company for the purpose of securing applications for insurance."

Rapalje in his law dictionary defines "representative" in these words: "A representative is a person who represents or takes the place of another."

Mr. Bouvier in his dictionary defines the word as: "One who represents or is in the place of another."

The Standard dictionary defines the word "representative" when used as a noun as "Ono who, or that which represents another person or thing; one who, or that which is fit to stand as a type * * * a person commissioned to represent his government or soverign at the court or in the court of another; an ambassador or other public minister; one who with respect to another's property stands in his place and represents his interests."

Then in truth and fact the agent had full power to represent the company, to speak for the company in all matters pertaining to the application for insurance. In that field and to that extent he had full power to speak for, to represent, the company; in all matters affecting the procuring of the application he stood for and took the place of the company itself. It placed its literature, its printed form of application containing questions to be propounded to and answered by the applicant, in his hands. Being thus armed with the company's printed form of application and its writing appointing him its "REPRESENTATIVE IN PROCURING APPLICATIONS," what more natural than that the insured should

look to him to explain the meaning of any term or question contained in the application? What more could he have had to induce the applicant to rely upon the meaning he should give to a question, or to words or phrases contained in the application? If an applicant were in doubt about the meaning of such a word or phrase, would it not be the natural thing for him to refer to the "Representative of the company" for its meaning? He certainly was to "Represent the company in procuring applications for insurance." If this did not give him power and authority to explain the meaning of a doubtful phrase or question, we ask in what did he represent the company? If he did not have this authority, it would seem as though he had no authority at all and could not represent the company at all. If the contention of the plaintiff in error is correct, it would seem that he only represented the company in procuring a large premium in payment of a worthless policy. So we have here not only the statute of Oregon requiring the company, as a condition precedent to its doing business in that state, to appoint agents to fully represent them, but we have the written appointment of the agent "as the representative of the company in procuring applications for insurance." There is nothing in the application to the effect that the agent shall not explain the meaning of any word or question as understood and meant by the company; but if there were, it could not overcome the fact that the company was bound by the actual powers conferred upon the agent by the written appointment of the officers of the company. Such provisions in the application will only apply to soliciting agents where no statute intervenes, or where, in fact, the agent did not have the power to represent the company.

So we claim that the Chamberlain case controls this. The court in that case uses this language:

"If it be said that, by reason of his signing the application, after it had been prepared, Stevens is to be held as having stipulated that the company should not be bound by his verbal statements and representations to its agent, he did not agree that the writing of the answers to questions contained in the application should be deemed wholly his act, and not, in any sense, the acts of the company, by its authorized agent. His act in writing the answer, which is alleged to be untrue, was, under the circumstances, the act of the company. If he had applied in person, at the home office, for insurance, stating in response to the question as to other insurance the same facts communicated by him to Boak, and the company, by its principal officer, having authority in the premises, had then written the answer "No other," telling the applicant that such was the proper answer to be made, it could not be doubted that the company would be estopped to say that insurance in co-operative societies was insurance of the kind to which the question referred, and about which it desired information before consummating the contract."

Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304.

The 8th Circuit Court of Appeals in the case of New *York Life Ins. v. Russell,* 77 Fed. p. 95, is in point. In that case the contract was made in the state of Nebraska where they had a statute similar to the Oregon statute. It follows the Chamberlain case as authority. The application contained language similar to the application in this case. The company defended on the ground that the applicant had committed a breach of warranty sim-

ilar to that in the Chamberlain case. The court in deciding the case uses the following language:

"Without saying in terms that the agent of the company shall be deemed the agent of the insured, the application in this case declares that:

" 'No statements, representations, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises, or information be reduced to writing, and presented to the officers of said company, at the home office, in this application.'

"The obvious purpose of this clause, like that which declared the agent of the insurance companies should be deemed the agent of the insured, is to enable the insurance company to escape from the necessary obligations and liabilities imposed by the law of agency on a principal who commits the conduct of his business to an agent. It is designed to evade a fundemental rule of the law of agency, and to shear its acknowledged agents of their appropriate and accustomed powers and duties, and impose them on the insured. If this application is to receive the construction contended for, no one can safely transact business with an agent of the company; for while he would be bound by his acts and representations and any information communicated to him by the agent, the company will not be bound by the acts or representations of its agent or any information communicated to him in the conduct of the business of his agency. Under such a rule, the rights and obligations of the contracting parties would not be reciprocal; contracts made with the company's agent would be one-sided; and the company could at its own election, avail itself of the acts and representations of its agents when it was profitable to do so, and repudiate them

when they were likely to prove burdensome. The company cannot play fast and loose in this manner. The persons who are authorized by the company to solicit insurance, take applications, or receive premiums in Nebraska are made by statute the agents of the company 'to all intents and purposes;' and it is not in the power of the company to shear these statutory agents of the powers and authority with which the law, for the protection of the public dealing with the company, invests them. These powers are precisely those which an agent of an insurance company possesses, upon whose powers and authority no special limitations have been imposed."

"Insurance companies perfectly understand the fact that these applications, which are framed by themselves, and furnished to their agents, are filled up, and the answers to the questions written down, by their agents, and that every applicant accepts without question the advice, direction, and assurance of the agents in all matters relating to the preparation of the application. This is a part of the duty of such agents, and the applicant has a right to assume that they will discharge it intelligently and honestly. He has a right to assume, also, that the agent will honestly and faithfully discharge his duty to his principal.

C.

The Chamberlain case is decided on two propositions, either one of which would have caused that court to sustain the judgment of the lower court and either one of which we claim will require this court to affirm the lower court.

In the first place, it held that under the statute of Iowa, as we have shown, the company was bound by the

construction that the agent placed upon the meaning of the question. In the second place, it held that the meaning of the question itself was not so absolutely certain as to preclude proof as to what kind of life insurance the contracting parties had in mind when the question was answered. In this case we have shown, we think, that, upon a fair construction of the question, it did not call for a disclosure of accident insurance; that at least, under the decisions we have cited, if there was a question about it, it was competent for the court to admit the testimony of the insurance agent as to the meaning that the agent gave to the question. The evidence was admissible for this purpose. In such a case the evidence does not vary, or tend to vary, the term of the contract, but simply explains the meaning of an ambiguous word. The purpose of the evidence is to show the construction that the parties themselves placed upon the word at the time that it was made. The evidence disclosed the fact that the insured wanted to know if the question called for a disclosure of accident insurance which he did not consider that it did. It also disclosed that the agent, the "Representative of the company," did not consider that it called for a disclosure of accident insurance; so both, acting honestly and fairly, omitted to mention the accident insurance. Mr. Dobler was not trying to conceal anything, but was anxious to correctly answer the question. It is evident that Mr. Dobler did not understand that he should mention his accident insurance; that he understood "insurance on life" in its common, ordinary sense, such as is used in common parlance. The Chamberlain case, speaking of this further, says:

"It is true that among the 'Provisions and Requirements,' printed on the back of the policy, is one to the effect that the contract between the parties is completely set forth in the policy and the application, and 'none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing, signed by the president or secretary of the company, whose authority for this purpose will not be delegated.' But this condition permits—indeed, requires—the court to determine the meaning of the terms embodied in the contract between the parties. The purport of the word 'insurance' in the question, 'Has the said party any other insurance on his life?' is not so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. Such proof does not necessarily contradict the written contract. Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the statute and of the understanding reached between the assured and the company by its agent when the application was completed, namely, that the particular kind of insurance inquired about did not include insurance in co-operative societies. In view of the statute and of that understanding, upon the faith of which the assured made his application, paid the first premium and accepted the policy, the company is estopped, by every principle of justice, from saying that its question embraced insurance in co-operative associations. The answer of 'No other' having been written by its own agent, invested with authority to solicit and produce applications, to deliver policies, and, under certain limitations, to receive premiums, should be held as properly interpreting both the question and the answer as to other insurance."

The lower court, in deciding this question, followed

the *Chamberlain* case, and, in deciding to admit this testimony, used this language:

"There is undoubtedly grave apparent conflict in the decided cases as to the true rule covering his question; but, after considerable thought on the matter, I have reached the conclusion that in this particular case what took place between the agent and the assured at the time this application was made may be properly received in evidence. It is a part of the *res gestae*. It shows the circumstances under which the application was made and the particular interpretation which was placed by the parties at the time upon this provision found in the application in regard to other insurance. Now, if it were perfectly plain and clear that the answer to that question required the applicant to disclose the fact that he had the accident policy mentioned, then this testimony would not be relevant; but it is not clear. The phrase itself is an ambiguous one. It may call for the disclosure or it may not. It is broad enough; it might be understood by the parties as calling for such disclosure, and, on the other hand, it may be understood by the parties as not calling for such disclosure. Now, the Supreme Court of the United States, in the case of the *Continental Insurance Company vs. Chamberlain*, 132 U. S., say that the purport of the word insurance, in the question, has the same party any other insurance on his life, is not so absolutely certain as in an action upon that policy to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was asked. Now, if that is the rule, a presumably reasonable one, to apply to this case, it is broad enough to permit the answer to the question as to what was said by the insurance agent in relation to the answers to be made to that question. Then let us go further, and consider that when the application was made, when it was completed, the matter of receiving it was the act of the agent of the company, and when it was

transmitted to the defendant, going as it did with the construction which he and the assured placed upon it, and when he accepted the money of the assured, the assured supposed he was making a full and complete answer to this question; I think that the company ought to be estopped from insisting upon a literal interpretation of the answer to that question. In other words, that it should be held to give it the same interpretation given it by its own agent at the time. Now, the court in this case *(Cont. I. Co. vs. Chamberlain,* 132 U. S.) say: The purport of the word in the question has the said party any other insurance on his life, is not so absolutely certain as in an action upon that policy as to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was asked. Such proof does not necessarily contradict the written proof. It simply explains it. It brings to the attention of the court and the jury what the parties meant in the use of the particular language which is under consideration.''

Record, pp. 123, 124, 125.

We do not think it necessary to consume much of the court's time in showing the clear distinction between the Northern Assurance Company case and the Chamberlain case. The Northern Assurance Company case, we think, is not in point, and certainly not contrary to the doctrine announced in the Chamberlain case. The Chamberlain case was affirmed by the United States Supreme Court in the case of *McMaster vs. New York Life Ins. Co.*, 183 U. S. 25, which was affirmed by the United States Court on the same day that the Northern Assurance Company case was argued. So it is very clear that the Supreme Court of the United States did not intend or consider that the Northern Assurance Company case in any manner con-

flicted with the doctrine announced in the Chamberlain case. In the Northern Assurance Company case it was provided that the policy would be void if the insured had any other existing insurance on the property, unless consent thereto was obtained in writing and endorsed on the policy. It is admitted that the applicant had other insurance which was not endorsed on the policy. There was a conflict in the testimony between the agent of the company and the insured as to whether the agent was informed of the existence of other insurance. There was no attempt to show that the agent of the company undertook to endorse on the policy the consent of the company to the other insurance. As soon as the company became aware of the fact of other insurance it cancelled the policy and tendered back to the insured the full premium therefor. The language of the policy in the Northern Assurance Company case was not ambiguous. There was no room for construction; its language was plain and clear, and no one who understood the English language could claim that he did not understand its meaning. The insured was not misled to his prejudice by the agent of the company. Here was a clear violation of the terms of the contract on the part of the insured. Judge Shiras, in writing the opinion in the Northern Assurance Co. case, evidently had this distinction in mind when he used the following language:

"In the present case such a provision was expressly and in unambiguous terms contained in the policy sued on, and it was shown in the proofs of loss furnished by the insured, and it was found by the jury, that there was a policy in another company outstanding when the present one was issued."

From this statement of the case it is perfectly clear that Judge Shiras, writing the opinion, desired to distinguish the decision from those based upon a construction of ambiguous language in a contract of insurance. Further on in the opinion and in citing *New York Ins. Co. v. Thomas,* 3 Johns, case 1, with approval, he quotes this language:

"The parol evidence is to be received in the case of an *ambiguitas latens* to ascertain the identity of a person or thing; but before the parol evidence is to be received in such a case, the latent ambiguity must be made out and shown to the court. In the present instance there is no ambiguity; the language of the contract throughout is consistent and explicit."

In another case which he cites with approval from New York he quotes this language:

"The contract between these litigants on the point which I shall discuss is clear and unambiguous."

The plaintiff in error did not, as in the Northern Assurance Company case, as soon as it learned of the alleged breach of warranty which rendered the policy void at the time of its issuance, return to Mr. Dobler the premium that he had paid upon the policy. It became aware of this alleged breach of warranty long prior to the commencement of the action in this case. It never offered or tendered to Mr. Dobler or his representative the premium thus paid upon the policy. This is an important distinction between the Northern Assurance Company case and the present case. As soon as the company learned of a breach of warranty which existed at its inception, and which was produced and brought about by the conduct of its agent, its

duty was, if it intended to insist upon the breach of warranty, to return the premium that had been paid by Mr. Dobler; but it took the ground that while the policy never had any validity at all, yet it might retain the premium paid upon it. Judge Shiras, in the Northern Assurance Company case, on this point uses the following language:

"There is no finding that the agent communicated to the company or to its general agent at Chicago, at the time he accounted for the premium, the fact that there was existing insurance on the property, and that he had undertaken to waive the applicable condition. Indeed, it appears from the letter of defendant's manager at Chicago, to whom the proofs of loss had been sent, which letter was put in evidence by the plaintiff and is set forth in the bill of exceptions, that the additional insurance held by the plaintiff was without the knowledge or consent of the company; and it further appears, and was found by the jury, that immediately on the company's being informed of the fact, the amount of the premium was tendered by the agents of the company to the insured. So that there is not the slightest ground for claiming that the insurance company, with knowledge of the facts, either accepted or retained the premium."

Judge Shiras cites with approval a case from Pennsylvania containing the following language:

"Defendant had notice of the additional insurance on the first Wednesday of November, 1894; notwithstanding that notice to the company, the policy was neither recalled nor cancelled; the premiums or assessments collected were not returned, nor was any effort made to return the premium note given by plaintiff binding him to pay the premiums at such times and in such manners as the company's directors might by law require. These facts were admitted

and if, as the authorities appear to hold, they operated as an estoppel, it will be unnecessary to consume time in the consideration of other questions sought to be raised by several of the specifications of error."

In the case of *McMaster v. New York Life Ins. Co., supra,* the court says:

"To permit the company to deny the acts and statements on which the transaction rested, would produce the same injury to McMasters, no matter what the agent's motives. But what is the proper construction of these contracts in respect to the asserted forfeiture? The company, although retaining the premiums paid and not offering to return them, contends that if McMasters was not bound by an agreement that the subsequent premiums should be paid on December 12th, then that the minds of the parties had not met, becaus it had not contracted except on the basis of payments so to be made; but the question still remains whether the right of recovery in this case is dependent upon such payment on the 12th day of December, 1894, or even thirty days thereafter. * * * On the other hand, can the company deny that McMasters claimed insurance which was not forfeitable for non-payment of premiums within thirteen months after the first payment? If it can, by reason of its own act, without McMaster's knowledge, actually or legally imputable, then the company's conduct would have worked a fraud on McMaster in disappointing, without fault on his part, the object for which his money was paid. The motive of the agent to get a bonus for himresult of his action would be the same."

D.

PLAINTIFF IN ERROR'S CONTENTION THAT THE CLAUSE IN SECTION 10, "HAVE YOU ANY OTHER ASSURANCE?" CALLS FOR A STATEMENT OF ACCIDENT INSURANCE, IS NOT SUPPORTED BY AN EXAMINATION OF THE WHOLE QUESTION.

Question 10 contains three clauses; we have heretofore copied them as they appear in the original application. The first and primary part of the question is: Have you now any assurance on your life? The other clause, Have you any other assurance, means have you any other insurance *on your life* than that mentioned. Examining this question to ascertain the intent of the parties, it should be remembered that the subject matter of the proposed contract was life insurance. The applicant was applying for life insurance to a life insurance company. The interrogatories were all directed to matters that would tend to throw some light on the question of whether the party who was making the application was a good or bad life insurance risk. The question of life insurance would be the one naturally uppermost in the minds of the parties as distinguished from any other form of insurance either on the person applying or his property. In construing question 10 and the clause "Other insurance," the rule *ejusdem generis* applies, according to which, general words following words of a more particular character, are regarded as limited in their meaning by the particular words.

Thus, where a contract for the sale of a patent right provided that the contract should be void if defects were found to exist in the patent whereby all its privileges could not be enforced, or if there should be "any other defects

whatever,'' the latter clause was held to be controlled by the previous clause, and consequently to refer only to defects in the patent, and not to defects in the machine patented.

Vaughan v. Porter, 16 Vt. 266.

And where an assignment in terms conveyed ''all the goods, wares, merchandise, and *personal property of every kind,* belonging to the assignor, it was held not to cover the assignor's interest under a contract; that while the general term ''personal property of every kind'' was broad enough if standing alone to include such an interest, its association with the preceding particular words showed the intention of the parties to refer to only ''visible, tangible property, *ejusdem generis* as goods, wares and merchandise.''

And so, in this case, the question in the application, ''Have you any other assurance?'' is broad enough, if standing alone, to cover all kinds of assurance, such as fire, life, health, accident, marine or employers' liability. But it is shown clearly, by reference to the questions preceding and following it, as well as the subject matter of the contract, to refer to life insurance.

The clause, ''Have you any other assurance?'' or a similar clause negativing any other assurance than that mentioned in the primary question, has an historical meaning in connection with application for life insurance. Ever since life insurance companies have used blank forms of application the inquiry as to what other life insurance the applicant was carrying has always been made. Many jurisdictions have held that an insufficient answer or a partial

answer to a question where the same has been made a warranty, would not render the policy void, that is to say, the questions and answers in this application having been made warranties, if Mr. Dobler had mentioned a part of his life insurance and omitted to mention a part, it would not be held a breach of warranty by many Supreme Courts. So, in order to compel the applicant to mention all his life insurance, which is a material matter for an insurance company to know, they have generally framed the question and answer as in this case, first to ask the applicant what insurance he was carrying upon his life, then to follow up by a question as in this case, "What other assurance?" thus getting a complete statement by one queston or the other of all the life insurance the applicant was carrying. That was the purpose of this clause. The purpose of this question will readily be seen by examination of the authorities.

Mr. Bacon in his work on insurance, in discussing this proposition, states the rule in the following language:

"Sec. 204. Where partial or no answers are made to questions.—It may happen that a question in an application for insurance is either partially answered or is not answered at all. In the latter case there is no warranty that there is nothing to answer. 'And so,' says the Court of Appeals of New York, 'in the case of a partial answer, the warranty cannot be extended beyond the answer. Fraud may be predicated upon the suppression of truth, but breach of warranty must be based upon the affirmation of something not true.' The question has most frequently come up where the applicant has stated the name of a single physician as his attendant where he has had others; in

such cases the rule has been laid down that where the answer is full and complete so far as it goes and does not purport to cover all possible cases, the company should exact a fuller answer if it desired it."

To the same effect is Mr. May on Life Insurance, section 166.

"If the company accepts an indefinite or insufficient answer, it will be construed liberally in favor of the insured; as where a question as to how the premises are occupied is answered, 'dwelling, etc.,' this will be held as notice that a saloon is kept there. If the answer be responsive and true in part, but irresponsive and untrue in part, this last will be only a representation. It must be material in order to avoid the policy. If the interrogatory he modified by the phrase 'so far as you know,' this holds the interrogated party not to answer absolutely, but to the best of hs knowledge and belief. If the answer be superfluous and immaterial it has no binding force. If a question is not answered, there is no warranty that there is nothing to answer; and where there is but a partial answer, the warranty cannot be extended beyond what is answered. Warranty must be pased upon the affirmation of something not true."

So the historical meaning and the technical meaning of the question are identical.

III.

THE COURT DID NOT COMMIT ERROR IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE GROUND THAT THE UNDISPUTED EVIDENCE SHOWED THAT FREDERICK C. DOBLER IN HIS APPLICATION COMMITTED A BREACH OF WARRANTY IN NOT GIVING THE NAME OF PHYSICIANS WHO HAD ATTENDED HIM OR WHOM HE HAD CONSULTED.

This assignment of error is based on the following questions and answers:

13.	A.	When did you last consult a physician and for what reason?	A. Do not remember, years ago.
	B.	Give name and address of last physician consulted.	B. .....
14.	A.	How long since you last consulted, or were attended by a physician? Give date.	A. Do not remember, long time ago.
	B.	State name and address of such physician.	B. Name ..... Address ....
	C.	For what disease or ailment?	C. .....
	D.	Give name and address of each and every physician who has prescribed for or attended you within the past five years, and for what diseases or ailments and date.	D. Name ..... Address.....
	E.	Have you had any illness, disease or medical attendance not stated above?	E. .....

The insurance company claimed that Dr. Phy of Baker City, Oregon, had attended and been consulted by Mr. Dobler within the meaning of these questions. That Mr. Dobler had committed a breach of warranty in not giving the name of Dr. Phy in answer to those questions. At the trial Dr. Phy was asked the question if he had ever at-

tended or been consulted as a physician by Frederick C. Dobler for any disease or ailment during his lifetime, to which he answered "No." In a subsequent queston he explained his answer in the following language:

"No; I may add further that I was an intimate friend of Frederick C. Dobler during the last six years of his life, and in conversation with him during our early friendship I had mentioned to him the advisability of persons in general having frequent physical examinations by their physicians as a matter of precaution. Mr. Dobler seemed impressed with this idea, and during the remainder of his lifetime I made several physical examinations of him including examinations of his urine and at no time did I find any physical ailment. All of these examinations were a matter of precaution with Mr. Dobler, and not with any idea that he had any physical ailment. I never prescribed any medicine for him. I did on several occasions advise him concerning hygenic measures which everyone should follow to preserve their health. I never made any charge for these examinations."

He was asked the further question whether in his personal knowledge Frederick C. Dobler was ever afflicted with any disease or ailment; he said "No" and his explanation above quoted, shows that Mr. Dobler never did consult him with any idea that he had any disease or ailment. The words "consult or attend" as used in applications for insurance, have a well known and defined meaning. They have reference to a consultation with a physician or an attendance by a physician for some disease or ailment more or less serious in its character. They have no reference to a mild disease or ailment such as a slight cold or indisposition or such an ailment as would not tend to impair the health or body of the applicant. An applicant might have

been attended once or twice for a cold or the grippe or any slight ailment and still properly answer the question "No." But in this case the applicant never consulted Dr. Phy for even a slight cold or ailment. He apparently was never so afflicted. Question 14 clearly shows that the words "consult or attend" were used in this sense, for a part of the same question is "For what disease or ailment." This clearly appears by reading together subdivisions A and C of Question 14:

A. How long since you last consulted or were attended by a physician?

C. For what disease or ailment?

Questions 13 of Part 1 and 14 of Part 2 should be read together. Our claim is that these questions only included a consultation with a physician or attendance by a physician, is fully supported by the following authorities:

"We pass now to the next question, which is as to the general rule of construction to be applied to the particular words used in the questions and answers which form the application. As to this, the rule given us by the Supreme Court is in some respects more favorable to the assured and in other respects less favorable, than those applied by the courts of the various states, as they will be found conveniently grouped in the notes of section 31 of Cooke's Law of Life Insurance (1891). The key to this expression is in the expression of Mr. Justice Harlan, in *Moulor vs. Insurance Co.,* supra, at page 340, 111 U. S., page 469, 4 Sup. Ct., and page 449, 28 L Ed., that the application must be understood to relate to matters which have a sensible, appreciable form. This rule was applied in *Connecticut Mutual Life Ins. Co. vs. Union Trust Co.,* 112 U. S. 250, 258, 5 Sup. Ct. 119, 28 L. Ed. 708, to the effect that

the questions and answers in an application do not ordinarily concern accidental disorders or ailments, lastng only for brief periods, and unattended by any substantial injury or inconvenience, or prolonged suffering. Indeed, they must have relation to the rule *de minimus lex non curat,* and to a sensible construction, and so they apply, ordinarily, only to matters of a substantial character. Therefore we accept the proposition of the plaintiff in error with reference to the word 'consulted,' found in these questions, that it would not relate to the opinion of a physician concerning a slight and temporary indisposition speedily forgotten."

Hubbard vs. Mutual Reserve Fund Life Ass'n.,
100 Fed. 719.

The Supreme Court of Michigan in the case of *Plumb vs. Penn Mutual Life Insurance Co.,* 65 N. E. 611, approved the charge given by the lower court in that case in the following language:

"If you shall find that within the three years she was attended by or consulted with another physician for any serious disorder other than the consultations with Dr. Mills, which I have charged you already about, that would be a breach of the conditions of this application, and a breach of the warranty, and would make this policy void, and the plaintiff in this case could not recover; but I charge it to be the law, as laid down by the Supreme Court of this state in the case of *Brown vs. Insurance Co.,* that a mere calling at a doctor's office for medicine to relieve a mere temporary indisposition, not serious in its nature, or his calling at the applicant's home for the same purpose, could not be considered an attendance within the meaning of this question; but that such attendance must be for some disease or ailment of importance, and not for any indisposi-

tion for a day, or so trivial in its nature, such as all persons are liable to, and yet are considered to be in sound health generally.''

To the same effect is *Billings vs. Metropolitan Life Ins. Co.* 41 Atl. 516, decided by the Supreme Court of Vermont. It disposes of the question in these words:

''In charging the jury, the court among other things, said: 'I instruct you that if, when he consulted physicians—if you find he did—he was not suffering from any disease, or that he did not consult them for a disease, then his answers to the interrogatories I have read (interrogatories 3, 6 and 7) would not render the policy void, and the plaintiff would be entitled to recover, notwithstanding he consulted these physicians, provided she has established her right of recovery in other respects;' to which the defendant excepted. The charge was correct. The question called only for consultation of physicians in respect to matters material to the risk of insuring the life of the insured. If he had consulted them upon matters other than disease or illness of himself, as we have defined them, it was immaterial.''

In the case of *Woodward vs. Iowa Life Ins. Co.* 56 S. W. page 1020, the Supreme Court of Tennessee sustains this view:

'' 'That if the said James W. Woodward consulted a physician, or was prescribed for by a physician, between the times mentioned, for a disease or ailment that was merely temporary—such as was curable, and passed away, and was not a permanent, habitual, and constitutional affliction, and indicated no vice in his constitution, and had no bearing upon his general health and the continuance of his life—in such case you should find for the plaintiff.' We have quoted this much of the charge in order that it

may be seen that the trial judge in fact covered the objection of the defendant below in a very favorable and pointed way."

In construing the meaning to be given to these words, the Supreme Court of Arkansas in the case of *Franklin Insurance Co. vs. Galligan* 73 S. W. 102, uses this language:

"WOOD, J. (after stating the facts). By the contract of insurance the answers given in the application are warranties. If untrue, they avoid the policy. But they must be construed in the sense contemplated by the parties to the contract. By the questions, 'How long since you were attended by a physician, or had occasion to consult one?' 'State the nature, gravity, and duration of the ailment or disease?' and 'Give the name and address of that physician?' and the answers thereto, the parties had in view some ailment or disease that would affect the contract of insurance. They did not, evidently, have in mind some slight indisposition, or trivial and temporary ailment, that in no wise affected the general health or constitution of the assured, and therefore did not increase the risks of insurance.

To the same effect is *Blumenthal vs. Ins. Co.* 96 N. W. page 17:

"This is an action on an insurance policy issued on the life of Nicholas I. Blumenthal. The defense interposed was false representations and warranties made by the insured in his application for the policy. The particular questions claimed to have been falsely answered, together with the answers given in the application, were the following: 'No. 15. Have you ever had chronic or persistent cough or hoarseness? A. No. No. 16. State particulars of any illness, constitutional disease, or injury you

have had, giving date, duration and remaining effects, if any. A. No disease or illness of any kind. No. 17. When did you last consult a physician? A. About a year ago. Q. For what? A. A cold and cough. No. 21. Give names and addresses of physicians who have attended you. A. C. L. Nauman, M. D., West Branch, Michigan.' ''

"It is argued at length by counsel for the defendant that the evidence conclusively shows the assured was suffering from a chronic and persistent cough for a considerable period before the application; that he had, within the period of a year, consulted physicians other than Dr. Nauman; and that his answers to each of these questions were shown to be untrue. It would not be of profit to set out at length the testimony bearing upon the question as to whether the ailments which the assured is shown to have had were such ailments or diseases as to seriously affect the general soundness and healthiness of the system, or whether, on the other hand, it was a mere temporary indisposition, not tending to undermine the constitution of the insured. An examination of the record discloses that this question of fact was sharply controverted at the trial, and that there is abundant evidence that, on the occasions when the assured had consulted physicians, the trouble under which he was suffering was temporary, and yielded to treatment. The law is settled that in a representation, contained in an application for insurance, that the assured is in good health, or that he has not been subject to illness, or that he has not been attended by a physician or consulted one professionally, the answer is to be construed as meaning, in the one case, that he has not suffered an illness of a serious nature, tending to undermine the constitution, and that a state of health is freedom from disease or ailment that affects the general soundness or healthiness of the system seriously. And as to representations as to treat-

ment by physicians, the omission to state a treatment by a physician for some temporary indisposition does not avoid the policy. See *Brown vs. Ins. Co.* 65 Mich. 306, 32 N. W. 610; *Pudritzky vs. Supreme Lodge* 76 Mich. 428, 43 N. W. 373; *Hann vs. Ins. Co.* 97 Mich. 513, 56 N. W. 834, 37 Am. St. Rep. 365; *Plumb vs. Ins. Co.* 108 Mich. 94, 65 N. W. 611; *Tobin vs. Ins. Co.* 126 Mich. 161, 85 N. W. 472; *Conn. Ins Co. vs. Trust Co.* 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708."

To the same effect is *Federal Insurance Co. vs. Smith* 86 Ill. 427.

We feel that we have fully answered all the errors assigned by the plaintiff in error. No one can read the record without being impressed with the fact that it would be an outrage on the beneficiary and would be a miscarriage of justice were the plaintiff in error to succeed in its defense. Although the reported decisions of the highest courts of the different states as well as those of the United States are full of cases wherein the defenses made by insurance companies are both unfair and unjust and without the slightest merit, we have not read of any case where the record discloses one more unjust or with less merit.

We ask the Court to affirm the judgment.

Respectfully submitted,

WARBURTON & McDANIELS,

Attorneys for Defendant in Error.

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IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,
Plaintiff in Error,
vs.
PRISCILLA DOBLER,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON, WESTERN DIVISION.

Reply Brief of Plaintiff in Error.

GALUSHA PARSONS,
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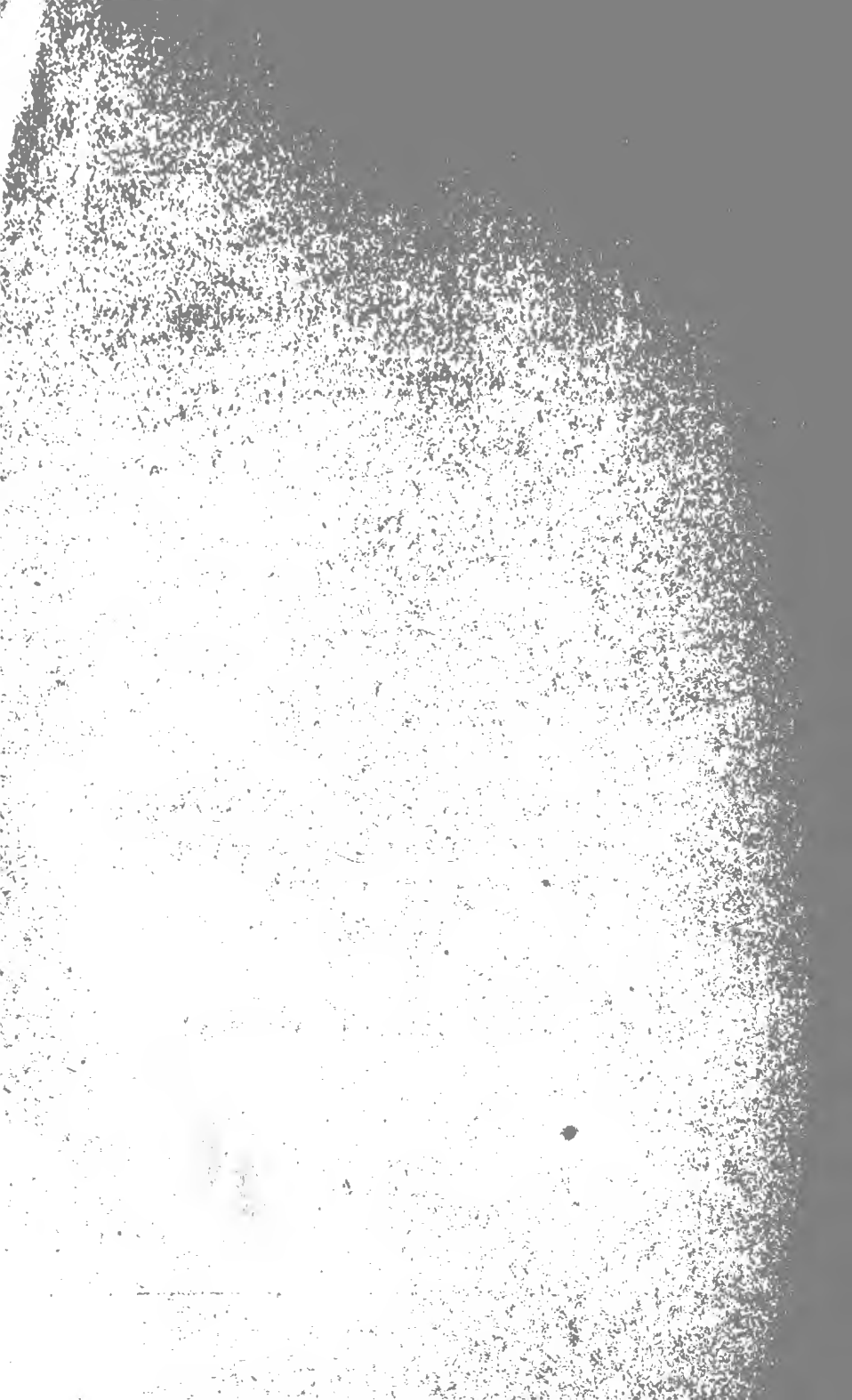

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REPLY BRIEF OF PLAINTIFF IN ERROR.

In their brief, at page five, counsel state that at the trial the company abandoned its defense, that the policy had not been delivered or the first premium paid according to its terms. This is not correct. The company did not and has not abandoned that defense. It was largely a question of fact, and that no error is here assigned or argued in that regard is true. But the defense was not abandoned, it was submitted to the jury.

In considering this case these things must be kept always in mind:

First. The terms of the contract.

The application and the policy constitute the contract which is the basis of this action and from which the rights and liabilities of the parties must be determined. We dislike to be constantly repeating the terms and conditions of this contract, but it is of the first importance that they be kept clearly in mind in considering this case in connection with other cases under different contracts.

Second. The terms of the contract, as contained in the application, constitute a plain limitation of the powers of the agent Stalker.

The terms of the application in this regard in this case, were practically the same as in the application in the case of New York Life Ins. Co. vs. Fletcher, 117 U. S., 519. In its opinion in that case the court said:

"The company, like any other principal, could limit the au-

thority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitation therein expressed."

Third. There is no statute applicable to this case declaring the soliciting agent the agent of the company, notwithstanding the terms of the contract.

Counsel in their brief assume that there is such a statute. Their entire argument is based upon that assumption. But they in no way point out any such statute and there is no such statute in the record. There is no such statute, and this is the first time that it has been in any way intimated or suggested that there was.

The first question discussed in our opening brief is: "Was the parol evidence of the witness Stalker admissible to vary modify or contradict the written contract, or to create an estoppel?"

In their brief, counsel for defendant in error argue that this testimony was admissible for the following reasons:

First. They say (page 10 of their brief) that the questions asked in the application in relation to other assurance did not call for a disclosure of the policy held by the applicant in the Travelers Insurance Company, therefore, it does not matter what the evidence was.

This was the very question which was submitted to the jury. Counsel assume to answer it, and, having answered it to their satisfaction, argue that it does not matter upon what evidence the jury answered it.

Second. Counsel next argue, in sub-divisions B and C of their brief, that this testimony was competent under authority of the case of Continental Insurance Co. vs. Chamberlain, 132 U. S., 304, and kindred cases. This is the only *argument* they offer upon the question of the admissibility of this testimony, and it is based absolutely upon the assumption that there is a statute applicable to this case similar to the statute of the State of Iowa, which was the basis of the decision in the Chamberlain case.

As we have heretofore stated, there is no such statute in this case. This branch of counsels' argument, therefore, has no bearing upon this case.

Counsel argue that because Mr. Stalker was appointed the agent of the company for the purpose of procuring applications for insurance, he was the agent of the company for all purposes in connection therewith, and the company is, therefore, bound by his acts.

Counsel overlook the terms of the contract. There would be force in the argument were it not for the fact that by the terms of the application the powers of the agent were expressly limited. This is the controlling feature of this case. If there had been no limitation upon the powers of the agent, or if such limitation had not been brought to the notice of the assured at the inception of the contract, a very different question would be presented. The law in this regard is well settled, and is clearly laid down in the cases of New York Life Insurance Co. vs. Fletcher, 117 U. S., 519, and Northern Assurance Co. vs. Grand View Building Association, 183 U. S., 308, heretofore referred to.

As stated in our opening brief, it seems to us that the case of Northern Assurance Co. vs. Grand View Building Association, 183 U. S., 308, is absolutely decisive of this case; it is only necessary to apply to this case the rules there laid down.

Counsel do not find much to say about that case, but they do say that the Supreme Court did not intend thereby to overrule or modify the Chamberlain case, because, in the case of McMasters vs. N. Y. Life Ins. Co., 183 U. S., 25, the Supreme Court followed and affirmed the Chamberlain case. Counsels' contention is evidently correct, because of the obvious distinction between the two cases. The decision in the Chamberlain case was based upon the statute of the State of Iowa; it was followed in the McMaster case under a similar statute of the State of Pennsylvania. There was no such statute in the Northern Assurance Co. case.

This is the very distinction between the case at bar and the Chamberlain case, which we have pointed out so often that we fear we will tire Your Honors by the reiteration. The fact that this distinction has been disregarded by counsel and by the lower court is our excuse.

Counsel attempt to draw a distinction between the case at bar and the case of Northern Assurance Co. vs. Grand View Building Association, because of the fact that the company in this case did not offer to return the premium. They again overlook the terms of the contract. The contract provides (Record p. 167): "If any of the answers or statements made are not full, complete and true, or if any condition or agreement shall not be fulfilled as required herein, or by such policy, then the policy

issued hereon shall be null and void, and all moneys paid thereon shall be forfeited to the company."

Moreover, there was a question of fact submitted to the jury as to whether or not any premium had been actually paid.

We do not find in the brief of counsel any argument in support of the ruling of the trial court in admitting the testimony of the witness Stalker, except the attempt to bring this case within the rules laid down in the Chamberlain and kindred cases decided under special statutes. That those cases are not in point in this case, where there is no such statute, must, we think, be manifest. And under the rules laid down in the Northern Assurance Company case it is equally manifest that the parol testimony should not have been received.

Upon the question of the refusal of the trial court to grant the motion of plaintiff in error, for a directed verdict, counsel argue:

First. There is a difference between life insurance and accident insurance.

Second. That the question: "Have you any assurance on your life? If so, where, when taken, for what amount, and what kinds of policies?" did not require a disclosure of the policy held by the applicant in the Travelers Insurance Co.

Third. That the question: "Have you any other assurance?" if it meant anything at all referred only to straight life insurance in life insurance companies. That, at most, it meant nothing more than the first question and required only that the applicant state all the straight life insurance he had.

Cases are cited where it was held, under the terms of the particular contracts there under consideration, that failure to disclose membership in some secret or beneficial order would not constitute a breach of warranty. In not one of the cases cited by counsel was the question asked that was asked in this case, namely: "Have you any other assurance?"

The cases cited by counsel involved the construction of particular contracts, as does this one. The question is, were the answers to the questions asked, full, complete and true? It being now admitted that at the time, the applicant did have the other assurance; that he had a policy which matured upon his death and under which the beneficiary was paid the sum of five thousand dollars. Suppose it had been $100,000. The principle would be the same, and it could not be seriously contended that under the terms of this contract this company was not entitled to know that fact before it assumed an additional risk.

The question was undoubtedly framed to meet just such a case as this. The company was undoubtedly aware that some courts had held that the usual form of question did not require a disclosure of certain forms of assurance. This company wanted to know of all the assurance the applicant held, therefore, it asked the question: "Have you any other assurance?"

Counsels' argument as to the "historical meaning" of the question: "Have you any other assurance?" that it is only to require a complete answer to the preceding question, is answered by one of the cases cited by them. Penn Mutual Life Ins. Co. vs. Mechanics Svs. B. & T. Co., 72 Federal, 413, where, at page 421, the court said:

"In Insurance Co. vs. Raddin, 120 U. S., 183, 7 Sup. Ct., 500, the Supreme Court held that, where the answers to questions were obviously incomplete, the insurance company, by failing to inquire further before issuing the policy, waived any right to complain of such incompleteness; but the court indicated its view that if such an answer was apparently complete, but in fact was otherwise, it was a false answer, and a breach of the warranty of its full truth. Towne vs. Insurance Co., 7 Allen 52, 53; London Assurance vs Mansel, 11 Ch., Div. 363; Bliss, Ins. (2nd Ed.), 189, 190; Phil. Ins., Secs. 550, 565, 567. The answer to such a question contains the necessary implication that there is no other insurance than that stated, and, if there is other assurance, it is as false as if the existence of other assurance were expressly denied."

Let us look briefly at the cases cited by counsel. The cases of Penn Mutual Life Ins. Co. vs. Mechanics S. B. & T. Co., 72 Federal, 413; Fidelity Mut. Life Assn. vs. Miller, 92 Fed., 63; McMaster vs. N. Y. Life Ins. Co., 183 U. S., 25; McClain vs. Insurance Co., 110 Fed., 80; and New York Life Ins. Co. vs. Russell, 77 Fed., 95, were all decided under special statutes similar to that upon which the case of Continental Insurance Co. vs. Chamberlain, 132 U. S., 304, was based.

In the case of Equitable Life Ass. Soc. vs. Hazlewood, 12 S. W., 621, it did not appear that the powers of the agent were in any way limited.

In the case of Palatine Ins. Co. vs. Ewing, 92 Fed., 111, it was held that a "rider" attached to the policy was the consent of the company to other assurance.

In relation to the breach of warranty in the answers to the questions regarding the applicant having consulted a physician, we would simply, once more, call attention to the terms of the contract.

The questions and answers in Part I of the application were:

Q. When did you last consult a physician and for what reason?

A. Do not remember; years ago.

Q. Give name and address of last physician consulted.

A. (No answer).

In view of the undisputed evidence, were these answers full, complete and true; were they literally true?

Here was a plain, simple question, calling for a simple statement of fact. It did not imply that the consultation was with regard to any disease or ailment. Those matters were inquired about in Part II of the application when he was undergoing his medical examination. All that was here wanted was to ascertain when he had last consulted a physician, for whatever reason, and the name and address of that physician. It is simply a question of the construction of this particular contract, as the cases cited by counsel presented questions of the construction of the particular contracts there under consideration.

In the case of Hubbard vs. Mutual Reserve Fund Life Assn., 100 Fed. 719, the court used the language quoted by counsel at pages 51 and 52 of their brief, but counsel omitted the essential part, being the last sentence of the paragraph from which they quote, which is:

"The difficulty, however, is that this qualification has no relation to the facts of the case at bar."

The trial court had directed a verdict for the insurance company, and the judgment was affirmed by the Court of Appeals.

Upon reading the brief of counsel for defendant in error, the thing which impressed us most strongly was, a tendency to disregard the terms of the contract upon which this action is based. From this contract, however, the rights and liabilities of the parties to this action must be determined. It is not enough to say that one of the parties is an insurance company, the other an individual, hence the individual must recover. We must look to their contract. That contract must be enforced under the established rules of law. The insurance company is as much entitled to the protection of the law as is the individual.

Undoubtedly there has been in the past great confusion as to the rules of law applicable to insurance contracts. Sympathy for the individual has, in some cases, led to decisions totally irreconcilable with law or reason. Some courts have gone so far as to disregard the elementary rule of law that parol evidence is inadmissible to vary or contradict a written contract.

But now, it would seem, there should be no further confusion, no further "divergence of decisions." The Supreme Court of the United States has settled the law. The decisions in the cases of New York Life Ins. Co. vs. Fletcher, and Northern Assurance Co. vs. Grand View Building Association, have established for all time the rules of law applicable to this case.

Applying those established rules of law in construing the contract upon which this action is based, in view of the admitted

facts, it at once becomes manifest that there was a fatal breach of warranty in the answers to the questions relating to other assurance. The lower court apparently recognized this conclusion, but thought it could be avoided by creating a new contract, or modifying the written contract, by means of the parol testimony of the witness Stalker.

In many of the States statutes have been enacted providing that a person soliciting an application for insurance, shall be held to be the agent of the company, anything in the application or policy to the contrary notwithstanding.

In other States statutes have been enacted providing that no misrepresentation or breach of warranty shall work a forfeiture of the policy or be ground of defense, unless it relates to a matter material to the risk or contributing to the loss.

There is no such statute applicable to this case.

In the absence of a statute the courts can but enforce the contract made by the parties. The contract must speak for itself, it cannot be modified by parol testimony. Every fact, every statement, every answer, warranted to be full, complete and true, must be so or no recovery can be had.

The law is clear and well settled. It has been established by the highest court in the land. If there is any fault in the law it is not the province of the courts to correct it.

But it is not an unfair or unreasonable law. An insurance company is entitled to protect itself; is entitled to require from an applicant for insurance that he make full, true and complete answers to such questions as may be asked him, and to provide,

that, for a limited time, the validity of the policy shall be dependent upon his doing so. The applicant is under no compulsion, he is at liberty to make the contract or not as he sees fit; but if he does make it he must perform upon his part.

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